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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MARVIN EDWIN JOHNSON
Petitioner,

-v.-

STATE OF FLORIDA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFNDER
SECOND JUDICIAL CIRCUIT
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QUESTION PRESENTED

Whether Florida's death penalty statute which allows the trial judge to impose the death sentence in a capital case over a jury recommendation of life imprisonment violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States.

No.

IN THE

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MARVIN EDWIN JOHNSON
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-v.-

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Johnson v. State, 393 So.2d 1069 (Fla. 1981), is set out in Appendix A infra.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on December 11, 1980 and rehearing was denied on March 6, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), petitioners having asserted below and asserting here deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the statutes of Florida:

> § 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
>
> (1) Separate proceedings on issue of penalty. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a seperate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> (2) Advisory sentence by the jury. -- after hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweight the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance the s. 775.082.

(4) Review of judgment and sentence. -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.-- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was expecially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

Petitioner was indicted for first-degree murder and robbery on August 29, 1978. On December 4, 1978 he received a trial by jury in which testimony was presented to show that he had committed a robbery of a pharmacy in which the pharmacist was killed after an exchange of gunfire with the robber (App. A, p. 1-2). The jury convicted petitioner as charged and an advisory sentencing proceeding was held on the murder conviction. At the conclusion of that proceeding the jury recommended a life sentence but the trial judge overruled the jury's recommendation and imposed the death penalty (App. A, p. 4).

Petitioner's conviction and sentence was reviewed by the Florida Supreme Court which issued an opinion on December 11, 1980, affirming the judgments of conviction and sentence of death (App. A). A timely motion for rehearing was filed by petitioner and denied on March 6, 1981.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In the trial court (See Appendix B, infra) and on appeal to the Florida Supreme Court (Appendix A, infra), petitioner fully raised the issue of Florida's procedure which allows the trial court to impose a death sentence after a jury recommendation of life and asserted that it violated his separate specified rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. Each of these contentions was expressly rejected by both the trial court and Florida Supreme Court (App. A, p. 6, 7). Although the justices were unanimous in their decision to uphold petitioner's conviction, three of the seven justices dissented to the imposition of the death penalty but not on constitutional grounds (App. A, p. 9-11).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF A DEATH SENTENCE CONTRARY TO A JURY PENALTY VERDICT OF IFE IMPRISONMENT VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, THE JURY TRIAL CLAUSE OF THE SIXTH AMENDMENT, THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This case concerns the narrow aspect of Florida's capital punishment scheme which permits the trial judge to impose a death sentence notwithstanding the jury's penalty verdict of life imprisonment based on statutory findings of fact. There

are thirty-four persons now under sentence of death in Florida (out of a total Florida Death Row population of 155) who would be directly affected if Petitioner were to prevail.[1] To petitioner's best knowledge, Florida is the only American jurisdiction where prisoners are under sentences of death after jury decision for life, although Indiana law would in theory seem to permit such an outcome.[2]

Petitioner urges that this Court grant certiorari because the infliction of death by the sovereign contrary to the decision of its own citizens throws into doubt not merely specific quarantees of the Bill of Rights, but seven centuries of jury inviolability under our Anglo-American system of jurisprudence and two centuries of representative advice and consent for extraordinary uses of government power under our United States Constitution.

Although this Court has considered various aspects of Florida's death penalty system, it has never focused squarely on the special and critical issue now before it.

In Proffitt v. Florida, 428 U.S. 242, 252 (1976), this Court upheld the overall Florida scheme and noted that particapation in penalty determination by the trial judge as well as the jury might promote more accurate fact finding. However, as Respondent Florida itself emphasized[3], that case involved a death sentence imposed by the trial judge with the concurrence of the jury.

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1. There are six prisoners under death sentences after jury life verdicts which have been affirmed by the Florida Supreme Court, and 28 others with such sentences pending before the Court. See also Appendices C and D.

2. See appendix E for a listing of current federal and state death penalty statutes.

3. See Proffitt, supra, O. T., 1975, No. 5706, Brief for Respondent at 78: "In this particular case, we are not confronted with an overriding of a recommendation of mercy, but rather unanimity as between the jury and the trial judge in concluding that death was the appropriate sentence."

In Dobbert v. Florida, 432 U.S. 282 (1977), petitioner was in fact sentenced to death notwithstanding a jury verdict of life imprisonment, but claimed only that his punishment under a statute enacted after the date of the crime violated the Ex Post Facto and Equal Protection Clauses. See id. at 432 U.S. 304, n. 1 (Stevens, J., dissenting):

> The atrocious character of this individual's crimes ... is of course no more relevant to the legal issue than the fact that 10 of the 12 jurors who heard all of the evidence voted to spare his life.

It is axiomatic that this Court does not resolve issues not raised on certiorari, see e.g. Mazer v. Stein, 347 U.S. 201, 208 and n. 6 (1954). However, Petitioner feels it important to show why Proffitt and Dobbert not only do not control the outcome of this case, but should not control.

Perhaps most crucially, in neither Proffitt nor Dobbert did this Court have the opportunity to measure Florida's provision for overriding jury life determinations against the overwhelming consensus of the States to the contrary both before and after the landmark decision of Furman v. Georgia, 408 U.S. 238 (1972). Since at that time (1976-1977) many jurisdictions were just reenacting death penalty statutes, no clear pattern of post-Furman legislative practice was then evident. In 1981, that pattern is clear and overwhelming.

Further, neither Proffitt nor Dobbert explored the evolution and current performance of the jury's function in capital penalty determination. In Duncan v. Louisiana, 391 U.S. 145, 154-155 (1968), this Court rejected dicta holding that jury trial did not apply to the States, stressing that such dicta were not based on careful inquiry in the jury's role in our system of law. This Court now has the opportunity to conduct the inquiry demanded by Duncan before a death sentence is carried out against the will of a jury.

Since Proffitt and Dobbert, this Court has also developed a more secure framework of death penalty law by which to test the overruling of a jury life decision against "evolving standards of procedural fairness". Gardner v. Florida, 430 U.S. 349, 357 (1977).[4/]

Further, this case may assist the Court in clarifying two continuing problems of double jeopardy law: defining an "acquittal," and drawing the line where the Constitution may prohibit legislative treatment of decisions for the accused as merely "advisory" or appealable.[5/]

Petitioner stresses that his success would not significantly disturb the scheme approved in Proffitt, since under Florida law a sustained and sustainable death sentence after a jury life decision is the rare exception.[6/]

Nor would Petitioner's success upset Florida's overall policy of judicial capital sentencing with an advisory jury as analyzed in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).[7/] In United States v. Jackson, 390 U.S. 570, 575-576 (1968), this Court noted that a scheme such as Florida's but with a jury decision against death final "would conform to the long tradition that makes the trial judge ... the arbiter of the sentence" while treating the jury's role as "merely advisory".

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4. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977), Lockett v. Ohio, 438 U.S. 586 (1978), Presnell v. Georgia, 439 U.S. 14 (1978), Godfrey v. Georgia, ___, U.S. ___, 100 S. Ct. 1759 (1980) and Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382 (1980).

5. See, e.g., Burks v. United States, and companion cases, 437 U.S. 1 (1978), Swisher v. Brady, 438 U. S. 204 (1978), United States v. Difrancesco, ___ U.S. ___, 66 L.Ed. 2d 328 (1980), and Bullington v. Missouri, No. 79-6740 (decision pending).

6. See Proffitt, supra, 428 U.S. at 248-250, and Dobbert, supra, 432 U.S. at 295-296.

7. Notably, the authoritative construction of Dixon stresses the trial judge's power to reduce an excessive jury verdict for death, see id. at 8, but makes no specific mention of the power to override a jury verdict for life.

Since petitioner's important claims have never been squarely addressed by the Court, and are of vital importance to our scheme of ordered liberty as it governs the choice for life or death, the Court should grant certiorari on the merits.

A. The Imposition Of Death After A Jury Decision For Life Is Contrary To The Near-Unanimous Consensus Of The States And The Great Weight Of Professional Legal Opinion, Raising Grave Questions Of Constitutionality Under The Sixth, Eighth And Fourteenth Amendments.

At the onset Florida's practice of overruling jury life decisions must be placed in a perspective of national experience and history. At no time in the past 30 years have more than three States allowed death sentences after jury decisions for life.

This Court has consistently looked to objective indicators, chiefly the existing laws and practices of the Nation, in testing jury practices under the Sixth Amendment[8/] and death penalty procedures under the Eighth Amendment.[9/]

In 1948, only New York, Delaware and Utah sanctioned this practice out of 42 jurisdictions (including federal) with discretionary capital punishment for murder.[10/] By the time of Furman (1972) only Delaware and Utah permitted such a procedure out of 41 capital murder jurisdictions (including federal and District of Columbia)[11/], New York having made a mercy decision by either the judge or the jury binding in 1963.[12/]

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8. See, e.g., Duncan, Supra, 391 U.S. at 161, Baldwin v. New York, 399 U. S. 66, 70-72 (1970), and Burch v. Louisiana, 441 U.S. 130, 138 (1979).

9. See, e.g., Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (mandatory death sentence), Coker v. Georgia, 433 U. S. 584, 593-597 (1977) (death penalty for rape of adult) and Beck v. Alabama, ___ U.S. ___, ___, 100 S. Ct. 2382, 2388 (1980) (Prohibition of lesser offense instruction in capital case).

10. See Andres v. Unites States, 333 U. S. 740, 767 (1948) (Frankfurter, J., concurring). Inadvertantly, Justice Frankfurter listed New York as binding and New Mexico as nonbinding, but see New Mexico Acts of 1939, Ch. 49 (jury recommendation of life imprisonment in capital case binding).

11. See Witherspoon v. Illinois, 391 U. S. 510, 525-527 and nn. 2-8 (1968) (Douglas, J., concurring). Both Utah and Delaware now make life imprisonment automatic unless the jury unanimously agrees on death. (See Appendix E).

12. See People v. Fitzpatrick, 308 N.Y. S.2d 18, 22 (1970).

Since the decision in Furman, of jurisdictions (including federal) which have adopted "guided discretion" death penalty statutes with jury participation in the penalty phase, only Florida and Indiana permit death sentences after jury decisions for life (see Appendix E). Moreover, only in Florida does it appear that such death sentences actually have been imposed since Furman.

An additional indicator of unconstitutionality under the Eighth Amendment is the great rarity with which death sentences after jury mercy recommendations were actually imposed and executed under the pre-Furman Utah and New York laws.[13/] (There were no executions in Delaware after 1949).

All seven Utah executions during the period 1948-1972 involved cases where the jury had refused to recommend life imprisonment; in two other cases death sentences were affirmed by the Utah Supreme Court after jury life recommendations, but the defendants received executive clemency (see Appendix F for Utah cases).

Knowledgable commentators have also stated that under the pre-1963 New York law, trial judges almost "invariably" followed jury recommendations of mercy. See Togman, The Two-Trial System in Capital Cases, 39 N. Y. U. L. Rev. 50, 75 n. 171 (1964), citing New York State District Attorney's Association, Memorandum and Draft Bill (October 17, 1960). In Williams v. New York, 337 U.S. 241 (1949), this Court affirmed a death sentence imposed despite a recommendation for life; but the defendant, Samual Titto Williams, received executive clemency, based in part on the jury's recommendation.[14/] See Message of the Governor of New York,

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13. For emphasis on actual frequency of imposition of the death penalty as an index of community standards under the Eighth Amendment, see Furman, supra, and Lockett, supra, 438 U.S. at 624-626 (White, J., concurring in part).

14. [Petitioner does not challenge the holding in Williams, which remains good law, see United States v. Grayson, 438 U.S. 41 (1978).]

November 16, 1949, N. Y. Leg. Doc. (1950) No. 10, pp. 13-14, quoted in Michael and Wechsler, Criminal Law and Its Administration (1956 supp.) 55.

This near-uniform consensus of the States that jury decisions against the death penalty should be final is in accord with professional legal opinion, another factor this Court has considered in both Sixth and Eighth Amendment decisions. [See, e.g., Duncan, supra, 391 U.S. at 156-157, and Gregg v. Georgia, 428 U.S. 153, 189-195 (1976).] Thus a major study endorsed by this Court found a reasonable basis for judge/jury disagreements in capital penalty decisions. [Kalven and Zeisel, The American Jury 445 (1966), cited in Duncan, supra, 391 U.S. at 157 and nn. 24 and 26.] The Court itself has praised the great reluctance of juries to impose death. [See Gregg, supra, 428 U.S. at 181-182; Furman, supra, 408 U.S. at 387-389 and 402 (Burger, C. J., dissenting).]

Severe critics of noncapital jury sentencing have advocated the jury's power to reject the death penalty. See, e.g., Note, Jury Sentencing in Virginia, 53 Virg. L. Rev. 968, 969 (1967), Rubin, The Law of Criminal Correction 325 (1963), Lafont, Assessment of Punishment--A Judge or Jury Function?, 38 Texas L. Rev. 834, 838 (1960), and Report of the Royal Commission on Capital Punishment, 1949-1953, Paragraph 571. This vital distinction was stressed by both professional sources cited in Proffitt, supra, 428 U.S. at 252 n. 10. See American Bar Association Project on Standards for Criminal Justice, Sentencing Alternative and Procedures, Section 1.1, Commentary (Approved Draft 1968) at 47-48 (strong reasons for requiring jury consent for death penalty) and President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in Free Society, Task Force Report, The Courts 26 (capital jury discretion generally accepted, but noncapital jury sentencing undesirable).

Especially relevant here are several authorities, including the American Law Institute Model Penal Code, which endorse

Florida's general scheme of judicial capital sentencing with an advisory jury, but stress finality for a jury determination of life. See American Law Institute, Model Penal Code Section 210.6 and Commentary at 133 (P. O. D. 1962), Togman, supra, 39 N.Y.L. Rev. 50, 53, Wollan, The Death Penalty After Furman, 1974 Criminal Justice Systems Rev. 213, 230, Symposium on Capital Punishment, 7 N. Y. L. Forum 249, 312-313 (1961) (Opinion of Prof. Louis B. Schwartz) and Comment, Jury Discretion and the Unitary Trial Procedure in Capital Cases, 26 Ark. L. Rev. 33, 52-53 (1972).

This Court should grant certiorari to measure the procedure by which petitioner was sentenced to death against these objective and manifest indexes of unconstitutionality.

B. Florida's Practice, As Interpreted By The Highest State Court In Petitioner's Case, Is Based On The Mistaken Notion That A Final Jury Decision For Life Would Violate The Federal Constitution, Indicating Violation Of The Eighth And Fourteenth Amendments.

As stated in Lockett v. Ohio, 438 U.S. 586, 602 (1978) the States "deserve clearest guidance" in interpreting Furman and subsequent death penalty cases. This Court should grant certiorari to clarify the Florida Supreme Court's notion that jury life determinations cannot be final, because their finality would violate Furman. This misunderstanding not only places the validity of Petitioner's sentence in doubt, but effectively chills the possibility for legislative change.

This Court has consistently rejected death penalty procedures premised on the misconception that Furman prohibited the "arbitrary" granting of mercy rather than the arbitrary infliction of death.[15/] The overruling of jury life decisions in Florida was

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15. See, e.g., Woodson v. North Carolina, 428 U. S. 280, 298-299 (1976) (mandatory death sentence), Lockett, supra, 438 U.S. at 599-600 and nn. 7-8 (restriction of mitigating factors in capital case) and Beck, supra, at ___ U.S. ___ n. 7 and ___-___, 100 S. Ct. at 2386 n. 7 and 2390-2392 (prohibition of lesser offense instruction in capital case).

was apparently conceived and is certainly now administered under such a misconception.

At the time of Furman, Florida had just amended it 1872 law, which permitted the majority of a jury to grant mercy in capital cases, providing for a separate penalty trial with suggestive standards (Laws of Florida, 1972, Ch. 72-72). After Furman a prominent Florida prosecutor advocated a scheme similar to the Model Penal Code, with an advisory jury's verdict of life final, and the Florida Senate passed such a law.[16/] However, the Governor had advocated exclusion of the jury from the penalty phase for fear of violating Furman[17/], and the Attorney General had expressed similar fears.[18/] Thus the provision in Florida's post-Furman law for death sentences after jury life verdicts can clearly be viewed as an aberration intended to comply with Furman rather than a free legislative judgment that jury life decisions should not be final. National practice before and after Furman supports this view.

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16. See Letter by Chief Assistant State Attorney Harry L. Shorstein of September 6, 1972, in A Final Report of The Governors Committee To Study Capital Punishment 69, 70 (1972) and Journal of the House of Representatives, November 30, 1972 at 41 (Senate's adopted version of Section 921.141 (4), making jury's failure to recommend death final).

17. See Ehrhardt and Levinson, Florida's Legislative Response to Furman: An Exercise In Futility?, 64 J. of Criminal L. and Criminology 10, 13-15 (1973).

18. See Hearings,Select Committee on the Death Penalty, Florida House of Representatives at 20-21 (August 9, 1972) (view of Attorney General that jury discretion with standards still risked violation of Furman).

In Douglas v. State, 373 So.2d 895, 897 (Fla. 1979), in deciding a challenge based on double jeopardy, the court itself confirmed this view when it held that prohibiting death sentences after jury life determinations would "place our statute in contravention of the directives of the United States Supreme Court". (Emphasis Supplied.) Id., the Court stated that its understanding of Furman was "perhaps more important" than any other consideration in rejecting for the first time a constitutional challenge to the overriding of life verdicts.

In Petitioner's case below, Johnson v. State, 393 So.2d 1069 at 1074 (Fla. 1980), the court specifically confirmed and restated its position in Douglas:

> [A]cceptance of defendant's assertion would place our present death penalty statute in contravention of the United States Supreme Court's directive in Furman ..., since to accept his argument would mean that a trial judge and this Court would be bound by the jury's recommendation of life. (Emphasis supplied.)

Of course this view is erroneous, see Gregg v. Georgia, 428 U. S. 153, 203 (1976) ("the isolated decision of a jury to afford mercy" does not invalidate system with adequate safeguards against arbitrary infliction of death). Petitioner stresses that he briefed the Court below on the overwhelming consensus of the States for final jury life determinations, see Douglas v. State, supra. Thus the court's misinterpretation of Furman is now a settled point in State law which cries out for clarification. Also of note, the High Courts of three states have sustained schemes where a jury life decision is binding but the trial judge is free to reduce a verdict of death -- the precise result which the Florida Court has declared contrary to Furman.[19/] Thus Florida law on this point is not only in con-

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19. See People v. Frierson, 25 Cal. 3rd 142, 177, 599 P. 2d 587, 607-608 (Cal. 1979), Collins v. State, 548 S.W.2d 106, 112 (Ark. 1977) (trial judge's power to reduce verdict of death promotes interests of Furman), and Smith v. Commonwealth, 248 S.E. 2d 135, 145-146 (Va. 1978).

flict with the near-uniform practice of the Nation, but is based on the assumption that the Cruel and Unusual Punishment Clause forbids deference to a jury's decision to spare life.

This Court has not hesitated to review and cure similar aberrations stemming from Furman. See nn. 9 and 15, above. Both the responsibilities of this Court as stated by the Chief Justice in Lockett, and the value of a human life which the conscience of the community has voted to spare, call for the granting of certiorari in this case.

C. Florida's Policy Of Overturning Jury Life Decisions Merely In Order To Avoid Isolated "Errors" For Mercy Violates The Sixth And Fourteenth Amendment Values Held Applicable To Capital Penalty Juries In Witherspoon v. Illinois, 391 U.S. 510 (1968).

Although this Court has not to date required jury participation in capital penalty determination[20/], it has demanded that any jury involved in deciding life or death must comport with the same basic Sixth and Fourteenth Amendment values as a jury trying the issue of guilt. Witherspoon v. Illinois, 391 U.S. 510, 518 (1968). Whereas Illinois deprived the jury of its representative nature by broad death-qualification of venirepersons, Florida strips the jury of a yet more fundamental attribute: the power to bind for the accused. By extending application of the Sixth Amendment to capital penalty juries, even though such juries may not themselves be required, Witherspoon is in accord with earlier cases which enforced "established tradition in the use of juries" at a time when the States were presumed free to dispense with jury trial altogether, see Smith v. Texas, 311 U.S. 128 (1940) at 130, and Turner v. Louisiana, 379 U.S. 466, 471-473 (1965).

Petitioner stresses that the issue on which he seeks review is not whether Florida law defines a jury's life decision as "merely advisory", but whether this definition is consistent with the Sixth Amendment values protected by Witherspoon.

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20. Question reserved in Lockett, supra, 438 U.S. at 609 n. 16.

The most absolute English monarch might intimidate, imprison, or attaint a recalcitrant jury--but could not reverse its verdict for the accused. See Powell, Jury Trial of Crimes, 23 Washington and Lee L. Rev. 1, especially 2-3 and n. 4 (1966). May Florida now exercise this power to impose a penalty whose very controversy was at the heart of Witherspoon's demand for a representative panel? See id. at 519-521.

As declared in Duncan, supra, 391 U.S. at 156-157, the jury's prime purpose, "to prevent oppression by the Government", may be especially served when the panel reaches a different result than the judge--and this purpose is utterly eviscerated if the Government may overturn a jury's decision in favor of innocence or life.[21]

Under Florida law, the practice of overriding jury life verdicts is based not on the premise that juries are incapable of making intelligent penalty decisions[22], but solely on the fear that in isolated cases juries will "unreasonably" reject death. See Chambers v. State, 339 So.2d 204, 208-209 (Fla. 1976) (England, J., concurring) (override of life verdict is to prevent "impassioned and unreasoned" decision against death). This "limited" but pernicious violation of the jury's integrity[23], whose only justification is that jurors "cannot be relied

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21. Even more stark and apposite here, see Parklane Hosiery Co., v. Shore, 439 U. S. 322, 354 (1979) (Rehnquist, J., dissenting): "It is precisely because the Framers believed that they might receive a different result at the hands of a jury of their peers, than at the mercy of the sovereign's judges, that the Seventh Amendment was adpoted".

22. See e.g. McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977) ("Juries are the conscience of our communities" in penalty phase), and Chambers v. State, 339 So.2d 204, 209 (Fla. 1976) (England J., concurring) (since death penalty decision is "reasoned judgement. .., both our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists".) (Emphasis supplied.)

23. See Reid v. Covert, 354 U. S. 1 39-40 (1957) ("slight encroachment" on jury trial and other safeguards may be most dangerous), and Parklane, supra, 439 U. S. at 345-346 (Rehnquist, J., dissenting) ("procedural reform" may erode vital functions of the jury).

upon to vote for death" when State law would make it "the proper penalty", see Witherspoon at 391 U.S. 518-519, is antagonistic to the entire Sixth Amendment concept of the jury as we have known it for 200 years.

In Bloom v. Illinois, 391 U.S. 194, 209 (1968), this Court stressed that although "recalcitrant or irrational juries" may occasionally acquit against the law, we are prepared to run the risk under the Constitution. When the Sixth Amendment requires finality for the outright acquittal of a dangerous criminal (e.g. of a racial murderer, based on approval for the deed)[24], this Court should carefully scrutinize Florida's refusal to accept a verdict of life imprisonment based, at worst, on "charity", see Witherspoon at 391 U.S. 520 and n. 17.

Under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), a death sentence after a jury life verdict may be sustained only if "virtually no reasonable person could differ". Thus Florida trial and appellate courts are required, in effect, to determine whether the jury's life decision was based on the evidence and the law, or was "unreasonable"--i.e., based on scruples against the death penalty. Florida's policy ignores the truth that jury verdicts for the accused are final in part because "the courts cannot search the minds of the jurors to find the basis upon which they judge". United States v. Moylan, 417 F.2d 1002, 1006 (CA4, 1969). (Emphasis supplied.)[25]

Whereas in Illinois an unrepresentative jury imposed the death penalty were a representative panel might choose life, Florida imposes the death penalty after a representative jury actually has chosen life. While Illinois stifled the community's verdict before its birth, Florida strikes it down in esse.

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24. See Powell, supra, 23 Washington and Lee L. Rev. at 5 and 10-11.

25. The fact that under Florida law the jury is instructed that it must base its penalty verdict on statutory findings of fact supported by evidence does not diminish the relevance of Witherspoon, but additionally places the override of a life decision in conflict with "the maintenance of the jury as a fact-finding body", Patton v. United States, 281 U.S. 276, 312 (1930)

This Court should grant certiorari to clarify the meaning of Witherspoon and the imperatives of the Sixth Amendment when the voice of the community has spoken for life. Obviously a Florida trial judge's power to override a jury death verdict does not violate the values of Witherspoon, see 391 U.S. at 518 n. 12: "At the time of the petitioner's trial, the jury's penalty determination was binding upon the judge. Ill. Rev. Stat., c. 38, Section 360, 801 (1959). That is no longer the case in Illinois, for the trial judge is now empowered to reject a jury recommendation of death, Ill. Rev. Stat., c. 38 Section 1-7 (c) (1) (1967), but nothing in our decision turns upon whether the judge is bound to follow such a recommendation." (Emphasis supplied.)

D. The Overturning At The State's Behest Of A Representative Jury's Verdict Against The Death Penalty Based On Statutory Findings Of Fact Constitutes A Unique Double Jeopardy Situation Under The Fifth And Fourteenth Amendments.

In the wake of recent decisions permitting "advisory" or appealable decisions in favor of juvenile and criminal defendants, Petitioner emphasizes five factors which together make his case a unique and critical test of when life itself has been placed in jeopardy under the Fifth Amendment.

(1) The decision to spare Petitioner's life was made by a representative jury, not a referee or judge. See United States v. Sisson, 399 U.S. 267, 334 (1970) (Burger, C. J., dissenting) ("the Constitution gives an accused the benefit of any mistakes in his favor of the first jury he encounters", but does not extend this finality to mistakes by judges). Accord, Westen and Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 130-137 (Fifth Amendment protects jury's inherent finality as conscience of community, but finality of decisions by magistrates and judges is up to legislatures).

(2) The jury's decision for the accused involved the constitutionally mandated choice of life or death, not a mere sel-

ection of discretionary sentencing alternatives. See Lockett v. Ohio, supra, 438 U.S. at 603-605 and n. 13. Both objectively and subjectively, the accused can reasonably be expected to place as much importance on the life/death determination as on the verdict of guilt or innocence itself.[26/] Indeed the imposition of a death sentence on a defendant after a jury life determination must cause a truly singular quantum of "continuing anxiety", whether or not the sentence is actually sustained on appeal and carried out.

(3) Unlike any usual sentencing procedure in noncapital cases (or even capital cases before Furman), the Florida procedure requires the jury to base its verdict for either life or death exclusively on statutory findings of fact supported by the evidence. Aside from the consideration of mitigating factors mandated by Gregg and Lockett, supra, the jury is required to resolve aggravating circumstances which the Florida Court has declared "actually define those crimes" punishable be death, see Dixon, supra, 283 So.2d 1, 9 (Fla. 1973), and thus "must be proved beyond a reasonable doubt", id. (emphasis supplied). Thus in 1981, Florida enacts in reality the hypothetical case which Mr. Justice Story found shocking in United States v. Gibert, (Case No. 15,204), 25 Fed. Cas. 1287, 1301 (CCD Mass. 1834): the prolongation by the Government of capital jeopardy after a jury has failed to find "aggravated circumstances" defing a capitally punishable crime:

> "suppose a robbery of the mail, charged in the indictment with being effected by wounding the carrier, or putting his life in jeopardy (which is a capital offence), and there is con-

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26. Compare Difrancesco, id, at ___ U.S. ___-___, 66 L.Ed. 2d 345-346 (noncaptial defendant's "primary concern and anxeity obviously relate to the determination of innocence or guilt", rather than the largely "nonadversarial" matter sentence). Under Green v. United States, 355 U.S. 184, 187-188 (1957), this case is radically distinguished from Difrancesco by the unique degree of "continuing...anxiety and insecurity" inflicted

> viction of the robbery without such aggravated circumstances, can a new trial be granted, upon the application of the government...? Many other cases of a like nature may easily be put, where the offence in an aggravated form is a capital felony, and without such aggravations not." (Emphasis supplied.)[27]

(4) Unlike the classic case of Stroud v. United States, 251 U.S. 15 (1919), here prolonged jeopardy to suffer the death penalty after a jury has rejected it is the result purely of State action, not of an appeal at the defendant's own behest. In this aspect, Bullington v. Missouri, supra, is similar to Stroud.

(5) In contrast even to the appeal by the prosecution of a jury's lesser offense verdict (on grounds of legal error) allowed in Palko v. Connecticut, 302 U.S. 319 (1937)[28], here the overturning of petitioner's jury life determination did not "wipe the slate clean" of the underlying first-degree murder conviction and did not provide him with the chance to present his case on either guilt or penalty to a second jury of his peers. Again this is in contrast with both Stroud and Bullington.

In order to interpret for today the guarantee against being put twice in jeopardy of life, this court should grant certiorari.[29]

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26. (cont.) while the prisoner awaits appellate review of a death sentence after a jury life verdict. At least one Florida Death Row inmate, Walter Carnes, committed suicide while awaiting review of such a sentence contrary to the verdict of his peers (see Appendix D), and the State appellate process may require an average of 2-3 years. Under Price v. Georgia, 398 U.S. 323, 331 (1970), this "is an ordeal not to be viewed lightly" even if the jury's decision is ultimately upheld by the Florida Supreme Court as "reasonable".

27. For cases equating aggravating circumstances in schemes like that of Florida with substantive definitions of capital murder, see Jurek v. Texas, 428 U.S. 262, 270 (1976), McGautha v. California, 402 U. S. 183, 206 n. 16, and Wilson v. State, 225 So.2d 321, 325 (Fla. 1969) (statute requiring aggravating circumstances for death penaly would in effect define "other prescribed elements" of first-degree murder) (emphasis supplied).

28. Overruled in Benton v. Maryland, 395 U.S. 784 (1969)

29. Obviously the Fifth and Sixth Amendments do not bar the reduction of a jury death verdict by the trial judge see United

E. Since The Overriding Of a Jury's Verdict For The Accused In A Trial Of Guilt Would Be Not Only Unconstitutional But Shockingly Unfair, Use Of This Procedure In The Penalty Phase Of A Capital Case Should Be Carefully Scrutinized Under The Due Process Clause Of The Fourteenth Amendment.

Under the flexible due process approach of Gardner, supra, this Court should grant certiorari to examine a death penalty procedure which would be not merely unconstitutional but fundamentally unfair in a trial of guilt, and for which the State can offer no persuasive justification beyond the risk of "error" in any criminal jury proceeding.

In Gregg, supra, 428 U.S. at 199 n. 50, this Court explained why "arbitrary" mercy is not banned by Furman:

> [I]f a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted.... Such a system, of course, would be totally alien to our notions of criminal justice. (Emphasis supplied.)

Since Florida's procedure is intended to remedy not "the corrosion of substantial legal error" but the jury's verdict against death after an error-free penalty trial, it would fail even the elementary finality test implicit in Palko, supra, 302 U.S. at 328. For such an interpretation of Palko, see Benton, supra, 395 U.S. at 810 (Harlan, J., dissenting): "...I have no hesitation in stating that it would be a denial of due process at least for a State to retry one previously acquitted following an errorless trial." Id., Justice Harlan held this principle of finality as "indubitably...to be ranked as fundamental."

The need for certiorari is underscored by the fact that overruling a jury's life decision has been condemned as "unfair"

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29 (cont.) States v. Martin Linen Supply Company, 430 U.S. (1977) ban overriding jurors judgment in manner harmful to accused has never prevented a trial judge from ruling in favor of criminal defendant). Accord, Hof v. Capital Traction Co., 174 U.S. 1, 13-14 (1899) (judge may set aside verdict "except on acquittal of a criminal charge").

by a Florida journal advocating the death penalty[30], and has been disapproved for the judge/jury conflict it spawns in a scholarly article generally commending Florida's capital case law. See, Shapiro, First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Peanlty in Georgia, Florida, Texas and Louisiana, 24 Loyola L. Rev. 709, 736 (1978) (disapproving "the tensions between trial judge and jury inherent in the Florida system"). See also id. at 743-747.

From a due process perspective, Florida's attempt to overturn "unreasonable" life decisions runs afoul of the simple truth stated in Spinkellink v. Wainwright, 578 F.2d 582, 605 (CA5 1978):

> [R]easonable persons can differ over the fate of every criminal defendant in every death penalty case. (Emphasis supplied.)

It is a further signal of fundamental unfairness when Florida tests a jury's decision for life by the same "reasonableness" standard applied to a criminal conviction or civil verdict. See Jackson v. Virginia, 443 U.S. 307, 317 (1979) n.10 (power of jury to enter "unassailable but unreasonable" verdict on "side of mercy" does not protect irrational "guilty" verdicts from review and reversal). See also Re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (fundamental fairness "requires a more stringent standard for criminal trials than for ordinary civil litigation").

Following the due process approach of Gardner, this Court might weigh Florida's deviation from the elementary norm of jury

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30. Editorial, "Let Jurors Decide Death Penalty," Miami Herald (April 24, 1980) at p. 6: "No one of conscience who supports capital punishment wants the death penalty imposed under rules that can be applied capriciously. It is more than unfair to the defendant to permit one person--the judge--to sentence him to death when the jury has voted for life imprisonment instead. It is, as well, a near-abondonment of faith in the jury system itself."

finality in light of four factors: (1) The accused's interest in finality; (2) The State's interest in disregarding that finality; (3) Any relevant differences between the guilt and penalty phases of the trial; and (4) The fiscal and administrative impact if the overriding of jury life determinations is prohibited. See also Note, Gardner v. Florida: The Application of Due Process to Sentencing Procedures, 63 Virg. L. Rev. 1281, 1284 n. 28.

Under this test, it is clear: (1) That the accused has an interest in the finality of a jury life decision which at least approximates her or his interest in the finality of an acquittal or lesser offense conviction; (2) That the State has less interest in overturning an "unreasonable" determination for the "severe" penalty of life imprisonment[31] than in overruling the outright acquittal of a dangerous criminal; (3) That Florida's policy is not based on any pertinent difference between the guilt and penalty trials, but merely on the risk of an "unreasonable" verdict for the accused which is inherent in any jury proceeding; and (4) That elimination of Florida's practice will promote rather than hinder both fiscal and judicial economy in death penalty cases.[32]

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31. The Florida Court called life imprisonment "a punishment of great severity" in Wilson, supra, 225 So.2d at 334, and it is more severe not because there is a 25-year minimum without parole under the 1972 statute (Section 775.082 (1), F. S. 1977).

32. This test gives a radically different result in noncapital sentencing. Point by point: (1) The defendant does not have an interest in the sentence comparable to that in the guilt/innocence determination; (3) Noncapital sentencing is a delicate and largely nonadversarial process requiring expertise beyond that of a jury; and (4) Providing for informed jury noncapital sentencing determinations would be most taxing, both fiscally and administratively. See Jury Sentencing in Virginia, supra, 53 Virg. L. Rev. at 969 and 997-998. As to point (2), an egregiously lenient sentence or jury recommendation in a noncapital case might closely approach in result an erroneous acquittal, in a situation where the accused has no overbalancing interest in either innocence or life, see DiFrancesco, supra.

This Court should grant this petition for certiorari in order to review Petitioner's case.

F. Infliction Of The Extraordinary And Controversial Sanction Of Death By An Unrepresentative State Judiciary, Contrary To The Verdict Of A Jury Of The People, Conflicts With The Scheme Of Limited And Representative Government Implicit In The Eighth And Fourteenth Amendments, And Violates The Principle Of Judicial Restraint.

Beyond calling into question specific guarantees of the Bill of Rights, the infliction of death after a jury's verdict for life casts a shadow of doubt over our entire scheme of limited government by advice and consent. The broad constitutional values at stake in Petitioner's case are an additional and compelling reason for granting certiorari.

In Gardner, supra, 430 U.S. at 357, this Court stated not merely that the death penalty is the ultimate penalty of our entire legal system, but further that "the action of the sovereign in taking the life of one of its citizens differs dramatically from any other legitimate state action". (Emphasis supplied.) Thus the decision to impose the death penalty is extraordinary, and should be especially subject to our overall scheme of democratic checks and balances.

As stressed in Powell, Jury Trial of Crimes, 23 Washington and Lee L. Rev. 1, 7-8, the absolute finality of a jury's verdict for the accused is guaranteed by the double jeopardy bar but far transcends that provision:

> The founding fathers, in light of history, decided that the balance here should be struck in favor of the individual. To reverse this today would negate the key role of the jury as a check on government. It might even unbalance our entire system of constitutional checks and balances. (Emphasis supplied.)

In Duncan, supra, 391 U.S. at 156, this Court likewise viewed the jury's role as reflecting "a fundamental decision about the exercise of official power", and recently Mr. Justice

Rehnquist emphasized this theme anew:

> "Just as the principle of separation of powers was not incorporated by the Framers into the Constitution in order to promote efficiency or dispatch in the business of government, the right to a jury trial was not guaranteed in order to facilitiate prompt and accurate decision of lawsuits." Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 348 (Rehnquist, J., dissenting).

Thus Florida's practice violates the check of jury finality for the accused in the one situation where it should be most inviolable.

In defending the death penalty under Eighth Amendment community standards, United States Solicitor General Robert H. Bork embraced the view now urged by Petitioner:

> In a representative democracy the legislature speaks for the people that elected it. Once enacted, the penalty cannot be imposed unless the people themselves, acting as a jury of the peers of the accused, agree to its imposition. And the jury, with its prerogative to "nullify" laws and penalties repellent to its sensibilities, is an effective ultimate check against legislative aberrations.
>
> Thus, if a penalty can pass the dual test of enactment by the people's representatives, and application by the people themselves sitting as a jury, it is almost certainly not... forbidden by the cruel and unusual punishment clause. (Emphasis supplied.)[33]

Since petitioner's death sentence fails such a "dual test", a test in accord with both the enormity of the death penalty and the role of the jury as an organ of our democracy, this Court should grant certiorari.

If Gardner is correct that capital punishment is an extraordinary power of the sovereign, then this Court should carefully measure Florida's procedure of death by dissensus against the constitutional norm of advice and consent for the Nation's gravest and most ominous decisions.

Under our Consitution it is hard to make war and easy to make peace, If either the House of Representatives or the Senate

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33. Gregg, supra, No. 74-6257 , O. T., 1975, Brief for the United States as Amicus Curiae at 30-31.

rejects war, that decision is final, though the Nation perish. While the President has sole power to appoint Justices to this Court, a refusal to concur by the Senate is final, though the nominee be worthy and the Senate's motive be not merely "unreasonable" but petty or partisan.

By unleashing the dog of capital punishment against the will of a representative jury, Florida defies the preference of our entire Constitution for error on the side of caution and restraint. Florida violates the norm of democratic pluralism by compelling the community to accept the death penalty after its representative voice has spoken for life.[34/]

In this case, the State after a full hearing was unable to persuade 7 of 12 jurors that death was appropriate. The State now maintains that Petitioner must be executed because "virtually no reasonable person" could agree with the jury, although 3 of 7 Justices in the court below eloquently defended the jury's penalty decision as not merely "reasonable" but appropriate, if not correct, see Johnson at 393 So.2d 1074-1076 (opinions of Sundberg, C. J. , and McDonald, J., with Overton, J., concurring in both these opinions). Such an execution rends the legal fabric of democracy itself.[35/]

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34. The State may not settle the matter simply by referring to a contrast between guilt determination and sentencing. Just as the declaration of war may seem more akin to the military and foreign policy responsibilities of the President than to the normal legislative function of Congress, so the individualized determination of life or death may (especially in the weighing of mitigating circumstances) appear more similar to noncapital sentencing than to a simple decision on guilt. However, like war, the decision to impose death transcends normal categories, and may not be taken against the advice and consent of a jury without undermining the legitimacy of the decision. In contrast, just as the President may take or ignore advice from Congress on normal military and foreign policy decisions, so a sentencing judge in a noncapital case may follow or disregard a jury's recommendation for leniency without compromising basic democratic values.

35. Florida's possible interest inpreserving the challenged procedure on the basis of federalist pluralism is vitiated by the very anti-pluralistic nature of compelling a community to accept the death penalty when its representative voice has spoken for life. Granting certiorari would show a concern for

These Justices iterated that the circumstances of the offense were such, especially the initiation of deadly force by the victim as the perpetrator was leaving the premises, that reasonable persons could rationally recommend life imprisonment rather than death for this defendant. Moreover, the facts provide ample evidence upon which the jury could have made a reasoned determination that aggravating circumstances either did not exist or were outweighed by the mitigating circumstances, including possible mental distrubance as a result of being wounded, the sparing of witnesses who were present, and the fact that it was not a planned killing. The verdict for the accused simply cannot be passed off as an unreasoned decision. Even if it could, it is the traditional power of a jury to refuse to find an aggravated offense where the facts might seem to justify otherwise. See, e.g. Green v. United States, 355 U.S. 184 (1957). A scintilla of doubt could, and should, be accorded weight by the factfinder as the one body which can properly make such a determination. See Report of the Royal Commission on Capital Punishment, 1949-1953, Paragraph 39. Also not contradictory to a reasoned judgment is the intangible impression by the jury of the accused whom this jury heard and observed as he testified. With a representative jury the values of the community regarding the penalty and the offense are manifestly to be recorded. Thus it is no extraordinary function of a jury to include such factors in its conclusion.

The Florida Court very recently stressed that when it affirms death sentences, "we are... the messengers, and not the message". Brown v. Wainwright, 392 So.2d 1327, 1333 (Fla. 1981).

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35. (cont.) the true pluralism reflected by petitioner's jury. Morever, the variety of death penalty statutes employed by jurisdictions which respect the jury's life determination show that "pluralism" will not be curbed if petitioner prevails.

Here, however, the people's message was for life, and the Florida judiciary acted not merely as the messenger but as the decreers of death.

In past death penalty cases, Justices of this Court have faced the "excruciating agony" of judicial restraint in deference to popular decisions for the death penalty. Furman, supra, 408 U.S. at 405 (Blackmun, J., dissenting). In this case, where the representative voice of the jury and the bias of our system in favor of life are in tandem, the warning of Mr. Justice Rehnquist carries special weight, id. at 470:

> [J]udicial overreaching may result in sacrifice of the equally important right of the people to govern themselves.

In order to clarify the meaning of judicial restraint when the conscience of the community has spoken for life, this Court should grant certiorari.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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(MEMBER OF THE BAR OF THIS COURT)

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Marvin Edwin JOHNSON, Appellant,

v.

STATE of Florida, Appellee.

Nos. 56167, 56703.

Supreme Court of Florida.

Dec. 11, 1980.

Rehearing Denied March 6, 1981.

Defendant was convicted before the Circuit Court in and for Escambia County, William Frye, III, J., of murder in the first degree and armed robbery, and was sentenced to death, and he appealed. The Supreme Court held that: (1) improper question allowed by trial court on cross-examination of defendant was harmless error; (2) facts affecting reliability of eyewitness' testimony were within ordinary experience of jurors and did not require any expertise

and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Section 4 of the act provides:

This act shall apply to all actions pending in the trial or appellate courts on the date this act shall take effect and to all actions thereafter initiated.

beyond jurors' common knowledge; and (3) although jury recommended life imprisonment, death was appropriate sentence to be imposed for murder committed during commission of armed robbery by escaped convict who had previously been convicted of felonies involving use or threat of violence.

Affirmed.

England, J., filed a specially concurring opinion.

Sundberg, C. J., filed an opinion concurring in part and dissenting in part in which Overton and McDonald, JJ., joined.

McDonald, J., filed a dissenting opinion in which Overton, J., joined.

1. Criminal Law ⇐730(3)

While some questions asked defendant on cross-examination were improper, no reversible error resulted from questions which allegedly attacked his character, contained false innuendo, and were premised on facts that the state was not prepared to prove, where with one exception trial court either sustained defense counsel's objections before defendant answered objectionable questions or gave adequate curative instructions.

2. Criminal Law ⇐1171.8(2)

Improper question allowed by trial court on cross-examination of defendant relating to his possession of a gun, other than murder weapon, almost two months after crime, without any curative instruction, was harmless error. West's F.S.A. §§ 59.041, 924.33.

3. Criminal Law ⇐1153(1)

Trial court has broad discretion in determining range of subjects on which expert witness may be allowed to testify and unless there is clear showing of error, its decision will not be disturbed on appeal.

4. Criminal Law ⇐469

Discretion of trial court to determine range of subjects on which expert witness may be allowed to testify is not boundless and expert testimony should be excluded where facts testified to are of such a nature as not to require any special knowledge or experience in order for jury to form conclusions from facts.

5. Criminal Law ⇐469

If disputed issue is beyond ordinary understanding of jury, expert testimony is admissible.

6. Criminal Law ⇐471

Facts affecting reliability of testimony of eyewitness to robbery and murder at pharmacy were within ordinary experience of jurors and did not require any expertise beyond common knowledge of jurors, and thus trial court did not abuse its discretion in granting state's motion to exclude proffered testimony concerning fallibility of eyewitness perception and identification.

7. Criminal Law ⇐438(4)

In prosecution for first-degree murder and armed robbery, court did not reversibly err in admitting photographs of pharmacy where robbery-murder occurred after officers had reconstructed scene of crime.

8. Homicide ⇐354

Three people who were present in drugstore at time of fatal shoot-out were not "many persons" in context of aggravating circumstance provision of death sentence statute but trial court's findings that there were other aggravating circumstances, including fact that defendant was under sentence of imprisonment when murder was committed and that he had been previously convicted of felony involving use or threat of violence, and that there were no mitigating circumstances, were proper. West's F.S.A. § 921.141(5)(c).

See publication Words and Phrases for other judicial constructions and definitions.

9. Criminal Law ⇐163

Imposition of death sentence upon defendant following his first-degree murder and armed robbery convictions, after jury recommendation of life imprisonment, did not violate his right against double jeopardy. U.S.C.A.Const. Amend. 5.

10. Jury ⇐31(1)

Trial court's imposition of death sentence after jury recommendation of life did not impinge upon right to trial by jury of defendant, who was convicted of first-degree murder and armed robbery, since function of jury in sentencing phase is not same as function of jury in guilt phase.)

11. Homicide ⇐354

Where facts suggesting death sentence were so clear and convincing that virtually no reasonable person could differ, there were no mitigating circumstances, statutory or otherwise, and there were valid aggravating circumstances, death was appropriate sentence to be imposed for murder committed during commission of armed robbery by escaped convict who previously had been convicted of felonies involving use or threat of violence.

Louis G. Carres, Asst. Public Defender, Tallahassee, Fla., for appellant.

Jim Smith, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Marvin Edwin Johnson appeals his convictions for murder in the first degree and armed robbery and his sentence of death. Finding no reversible error in either the convictions or the sentence, we affirm. Johnson does not challenge the life sentence that he received for the armed robbery.

Gary Summitt, an employee of Warrington Pharmacy and an eyewitness to the robbery and the murder, testified that while working at the pharmacy on the evening of June 7, 1978, he went to the back of the store to ask the pharmacist, Woodrow Moulton, a question. There he saw the defendant Johnson holding a gun on Moulton who was at the pharmacy safe putting articles in a bag, and he heard Johnson order Moulton to put certain drugs and money from the safe into the bag. After obtaining the drugs and money, Johnson started towards the front of the store. Moulton then grabbed a gun from behind the prescription counter. There was an exchange of gunfire, and Moulton continued to fire at Johnson until his gun was emptied. No longer able to defend himself, Moulton stood up with his hands in the air. Johnson then walked up to within a foot and a half of the defenseless pharmacist, said "You think you're a smart son-of-a-bitch, don't you?," and shot him in the chest.

Johnson was indicted for and convicted of first-degree murder and robbery. Although the jury recommended a life sentence, the trial court found no mitigating factors and five aggravating factors and imposed the death penalty.

[1, 2] Johnson challenges his convictions on several grounds. He first contends that he was deprived of a fair trial because certain questions asked of him on cross-examination were not relevant, attacked his character, contained false innuendo, and were premised on facts which the State was not prepared to prove. Some of the questions were improper, but no reversible error resulted because, with one exception, the trial court either sustained defense counsel's objections before Johnson answered the objectionable questions or gave an adequate curative instruction. After examining the entire record, we conclude that the one improper question allowed by the trial court relating to defendant's possession of a gun, other than the murder weapon, almost two months after the crime and for which there was no curative instruction, was harmless error. Section 924.33, Florida Statutes (1977); Section 59.041, Florida Statutes (1977).

Johnson also contends that the trial court deprived him of his rights to due process of law and to compulsory attendance of witnesses by granting the State's motion in limine to prevent the testimony of an expert witness who would have testified about the fallibility of eyewitness perception and identification. The State asserts that the facts affecting the reliability of an eyewitness identification are within the ordinary experience of jurors, that the conclu-

sions to be drawn from the facts affecting the reliability of an eyewitness should be left to the jury, and that expert opinion should be excluded where the facts testified to are of a nature as not to require any special knowledge or experience to form a conclusion.

[3-5] The trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify, and, unless there is a clear showing of error, its decision will not be disturbed on appeal. *Fortianas v. State*, 329 So.2d 397 (Fla. 1st DCA 1976). We reiterated this proposition most recently in *Buchman v. Seaboard Coast Line Railroad Co.*, 381 So.2d 229 (Fla.1980). In *Buchman*, we affirmed the trial court's admission of expert testimony in a railroad crossing accident case because there was no clear showing that the court abused its discretion in admitting the expert testimony. *See also Welfare v. Seaboard Coast Line Railroad Co.*, 373 So.2d 886 (Fla.1979); *Public Health Foundation for Cancer and Blood Pressure Research, Inc. v. Cole*, 352 So.2d 877 (Fla. 4th DCA 1975), *cert. denied*, 361 So.2d 834 (Fla.1978). This discretion, however, is not boundless and expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts. *Nelson v. State*, 362 So.2d 1017 (Fla. 3d DCA 1978); *Johnson v. State*, 314 So.2d 248 (Fla. 1st DCA 1975). The common thread running through all the decisions dealing with the admissibility of expert testimony is the premise that if the disputed issue is beyond the ordinary understanding of the jury, such testimony is admissible. *Public Health Foundation for Cancer and Blood Pressure Research, Inc. v. Cole; Seaboard Coast Line Railroad Co. v. Kubalski*, 323 So.2d 32 (Fla. 4th DCA 1975); *Seaboard Coast Line Railroad v. Hill*, 250 So.2d 311 (Fla. 4th DCA 1971), *writ discharged*, 270 So.2d 359 (Fla. 1972).

In *Nelson v. State*, the appellate court affirmed the trial court's exclusion of expert testimony of a psychologist on matters of eyewitness identification from a criminal trial and correctly stated:

> When facts are within the ordinary experience of jurors, conclusions to be drawn therefrom are left to the jury. *McGough v. State*, 302 So.2d 751 (Fla. 1974); *Tongay v. State*, 79 So.2d 673 (Fla. 1955); *Thomas v. State*, 317 So.2d 450 (Fla. 3d DCA 1975). We believe it is within the common knowledge of the jury that a person being attacked and beaten undergoes stress that might cloud a subsequent identification of the assailant by the victim. As such, the subject matter was not properly within the realm of expert testimony.....

362 So.2d at 1021.

[6] In the present case, the facts affecting the reliability of Gary Summitt's testimony were within the ordinary experience of the jurors and did not require any expertise beyond the common knowledge of the jurors. The trial court did not abuse its discretion in granting the State's motion to exclude the proffered expert testimony.

[7] We also reject Johnson's argument that the court reversibly erred in admitting into evidence photographs of the pharmacy after the officers had reconstructed the scene of the crime.

In addition to reviewing the record in light of the alleged errors set forth by Johnson, we have reviewed the evidence pursuant to Florida Rule of Appellate Procedure 9.140(f) to determine whether the interests of justice require a new trial, and we conclude that no new trial is required. Accordingly, we affirm the convictions.

Johnson also challenges his sentence of death on several grounds. After the jury recommended a life sentence, the trial court, finding no mitigating circumstances, imposed the death sentence. As aggravating circumstances, the court found:

> *FINDING*: Marvin Edwin Johnson was under sentence of imprisonment in the State of Tennessee, but had escaped therefrom, when he committed the murder of which he has been convicted.

. . . . . .

FINDING: Marvin Edwin Johnson had not previously been convicted of any capital felony, but had been convicted of a felony involving the use or threat of violence to the person, to-wit:

1. On October 14, 1964, the defendant pled guilty to the offense of robbery in Glynn County, Georgia, and sentenced to four years, wherein said robbery was committed by "grabbing and holding (the victim), throwing him down upon a bunk located in the Glynn County Jail, tying his hands and feet ..., placing a cloth gag in his mouth, and threatening and offering to strike and hit him with two pieces of metal, fastened together, making one piece ..., the same being then and there an offensive weapon, and a weapon likely to produce death if used in the way and manner as then and there threatened...." *State Exhibit No. 1, Penalty Phase, December 9, 1978.*

2. On November 16, 1976, the defendant was found guilty and sentenced to twenty years for the offense of armed robbery in Bradley County, Tennessee. *State Exhibit No. 5, Penalty Phase, December 9, 1978.*

3. The defendant testified at the trial that he had been convicted of a crime ten times. The only evidence of what those crimes were are the two convictions enumerated in 1 and 2 above. This Court has recently been furnished copies of several prior convictions of the defendant, but the Court has neither studied these documents nor knows the details of them. Copies have been sent to defense counsel. In view of the evidence of prior convictions, the Court makes no judicial determination of what type of convictions are on the defendant's record except as enumerated above.

. . . . .

FINDING: Marvin Edwin Johnson did create a great risk to many persons. He did, in robbing Woodrow Moulton at gunpoint and in the ensuing gun battle within the confines of the Warrington Pharmacy, and in murdering the said Woodrow Moulton, create a great risk of death to the other three persons present in the drugstore at the time.

. . . . .

Finding: The murder was committed while Marvin Edwin Johnson was engaged in the commission of an armed robbery of the Warrington Pharmacy.

. . . . .

FINDING: The murder was committed during an armed robbery during which the defendant, Marvin Edwin Johnson, engaged in a pistol shoot-out with the victim. Upon discovering that the victim had exhausted his ammunition, and with the victim's arms raised in a sign of surrender, the defendant coolly and with calculation approached the victim and pointing his .357 magnum revolver within a foot or two of the victim's chest, remarked to his victim, "You think you're a smart son-of-a-bitch, don't you?", and proceeded to shoot the victim dead with one shot through the victim's heart.

While the method and manner of the murder was not especially heinous, except to the extent that any murder is heinous, the murder was atrocious and cruel and was committed to reek revenge upon Woodrow Moulton for having defended his life and property in a completely lawful manner.

The trial court made it perfectly clear at the sentencing hearing that it had not restricted itself solely to the statutorily enumerated mitigating circumstances.

[8] The trial court erroneously found that Johnson created a great risk of death to many persons. The "many persons" referred to by the trial court were the other three persons present in the drugstore at the time of the shoot out. Three people are not "many persons" as we have interpreted that term in the context of section 921.-141(5)(c). *Kampff v. State*, 371 So.2d 1007 (Fla.1979). We therefore hold that this aggravating circumstance is not applicable. However, the trial court's findings that there were four other aggravating circumstances and no statutory or other mitigat-

ing circumstances were proper. *See State v. Dixon*, 283 So.2d 1 (Fla.1973).

[9] Johnson's contention that the imposition of death after a jury recommendation of life violates his right against double jeopardy has already been rejected by this Court in *Douglas v. State*, 373 So.2d 895 (Fla.1979). In *Douglas*, we held that a jury's recommendation of life is not tantamount to a judgment of acquittal of a crime for which a death sentence is appropriate since such recommendation is advisory only, and we explained that acceptance of defendant's assertion would place our present death penalty statute in contravention of the United States Supreme Court's directives in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), since to accept his argument would mean that a trial judge and this Court would be bound by the jury's recommendation of life.

[10] He further asserts that for the trial court to impose a death sentence after a jury recommendation of life impinges on his right to trial by jury. The function of the jury in the sentencing phase, however, is not the same as the function of the jury in the guilt phase. The United States Supreme Court, in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), approved the role of the jury under Florida's death penalty statute as advisory only. *See also Douglas v. State; Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

Johnson's arguments that the court's override of the jury recommendation amounts to cruel and unusual punishment and violates his right to due process of law are likewise without merit. These arguments are based on the same faulty premise as Johnson's double jeopardy argument that the jury's role is more than advisory—that it binds the trial court and this Court.

[11] Johnson's final argument is that the trial court's overriding of the jury's life recommendation is contrary to the dictates of *Tedder v. State*, 322 So.2d 908 (Fla.1975). In *Tedder*, we held that a jury's recommendation of life should be given great weight and that in order to sustain a sentence of death, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Later in *Hoy v. State*, wherein we sustained the trial court's override of a jury recommendation, we said that the jury recommendation is to be accorded great weight, but the ultimate decision as to whether the death penalty should be imposed rests with the trial judge. In the present case, we find from the totality of the circumstances that the facts suggesting the death sentence are so clear and convincing that virtually no reasonable person could differ. There are no mitigating circumstances, statutory or otherwise, and there are four valid aggravating circumstances. We conclude that death is the appropriate sentence to be imposed for this atrocious and cruel execution murder committed during the commission of an armed robbery by an escaped convict who previously had been convicted of felonies involving the use or threat of violence.

Accordingly, having found no reversible error, we affirm the convictions and sentences.

It is so ordered.

ADKINS, BOYD, ENGLAND and ALDERMAN, JJ., concur.

ENGLAND, J., concurs specially with an opinion.

SUNDBERG, C. J., concurs in part and dissents in part with an opinion, with which OVERTON and McDONALD, JJ., concur.

OVERTON, J., concurs as to the conviction, but dissents as to the sentence.

McDONALD, J., dissents with an opinion, with which OVERTON, J., concurs.

ENGLAND, Justice, concurring specially.

While I concur in the Court's affirmance of Johnson's conviction and sentence, I cannot characterize this killing as either atrocious or cruel, as those terms are used in our death penalty statute. My disagreement on this point, however, is irrelevant to the outcome of the case.

SUNDBERG, Chief Justice, concurring in part and dissenting in part.

I concur in so much of the majority opinion as affirms the convictions in this case, but I must respectfully dissent from that part which affirms the sentence of death.

Because the jury recommended the imposition of a life sentence, the standard to be applied in determining whether to sustain the trial judge's death sentence is that "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). After a complete review of the circumstances surrounding this criminal episode as cataloged in the majority opinion, I believe reasonable persons could clearly differ over whether this homicide is so set apart from the norm as to call for imposition of the death penalty. Conceding, as must any person, that all murders are unwarranted and anathema to any civilized society, nonetheless our capital punishment statute reserves the death penalty for those acts which are so flagrantly vile, cruel and outrageous as to set them apart from other capital felonies.

From the seminal case upholding our capital punishment statute we are taught:

> Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the *most* aggravated and unmitigated of most serious crimes.

State v. Dixon, 283 So.2d 1, 7 (Fla.1973) (emphasis added).

. . . . . .

> Thus, it [§ 921.141, Fla.Stat.] again presents evidence of legislative intent to extract the penalty of death for only the *most* aggravated, the *most* indefensible of crimes.

Id. at 8 (emphasis added).

. . . . . .

> What is intended to be included are those capital crimes where the actual commission of the capital felony was *accompanied by such additional* acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9 (emphasis added).

and finally:

> It must be emphasized that the procedure to be followed by trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Id. at 10.

I submit that notwithstanding the existence of four aggravating circumstances and the absence of any statutory mitigating circumstances, in light of the totality of the circumstances here present the jury could and did quite reasonably conclude that life imprisonment is the appropriate sentence. *See Neary v. State*, 384 So.2d 881 (Fla. 1980). There is nothing about the actual homicide itself to set it apart from the norm of murders—a single gunshot to the chest with death ensuing instantly. And the circumstances surrounding the criminal episode—the fusillade of pistol shots initiated by the victim and the apparent conscious act of the appellant to spare the two other occupants of the premises from kidnapping or murder—support a reasoned judgment by the jury in favor of a life sentence. Hence, I would affirm the convictions but vacate the death sentence with directions to impose a sentence of life imprisonment without eligibility for parole until the expiration of twenty-five years.

OVERTON and McDONALD, JJ., concur.

McDONALD, Justice, dissenting.

I would affirm the conviction but dissent from the imposition of the death sentence.

I disagree with the statement that from the totality of the circumstances the facts suggesting the death sentence are so clear and convincing that virtually no reasonable

person could differ. Prior to the shooting the defendant had completed his crime of robbery and was leaving. The victim initiated the shooting. I do not condone the acts of the defendant thereafter in the slightest, and there is ample evidence to support premeditated murder, but I feel that there may be factors which would justify the jury's recommendation of mercy. The testimony of the psychologist could lead one to believe that the defendant's apparent malevolent act against the victim was in fact an unplanned reaction to being fired at. He directed no overt act of hostility or harm at the witness Summitt, whose subsequent testimony at trial was primarily responsible for Johnson's conviction, nor did he attempt to harm any other occupant of the store. Since he apparently showed some mercy the jury could have felt it should also. The proper sentence in this case is life imprisonment.

OVERTON, J., concurs.

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MARVIN EDWIN JOHNSON,

Defendant.

CASE NO. 78-1869

Before me 1/23/79
Judge
Denied

FILED & RECORDED
JAN 10 4 15 PM '79
ESCAMBIA COUNTY, FLA.

MOTION FOR ARREST OF JUDGMENT

COMES NOW the Defendant, MARVIN EDWIN JOHNSON, pursuant to Florida Rule of Criminal Procedure 3.610, and moves this Honorable Court to arrest the judgment sentencing the Defendant to death on the following ground:

1. The judgment and sentence of death by the Court fails to conform to the jury finding at the penalty phase. Not only is the verdict uncertain in support of said sentence, the jury found that there were either no aggravating circumstances or the aggravating circumstances were outweighed by the mitigating circumstances.

The concept of overturning a jury's finding of fact in favor of a criminal defendant is unknown in common law and violative of the Sixth Amendment to the United States Constitution and Article 1, Section 22 of Florida's Constitution; the Fifth and Fourteenth Amendment to the United States Constitution and Article 1, Section 9 of Florida's Constitution; the Eighth Amendment to the United States Constitution and Article 1, Section 17 of the Constitution of the State of Florida.

WHEREFORE, the Defendant prays this Honorable Court will enter its order arresting the judgment entered by this Court.

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APPENDIX C

DEATH SENTENCES IMPOSED IN FLORIDA AFTER JURY PENALTY VERDICTS OF LIFE IMPRISONMENT, 1973-1981

In the list which follows, the abbreviation "FSC" means the Florida Supreme Court, while "USSC" means United States Supreme Court. Each individual sentenced to death is listed only once, although in some cases more than one death sentence may have been imposed on a single defendant for different offenses, and in other cases a death sentence may have been imposed, reversed, and then reimposed. Under Gardner v. Florida, 430 U.S. 349 (1977), a number of death sentences have been remanded to the trial court in order to give the accused an opportunity to rebut or respond to any previously undisclosed material considered in imposing the original sentence of death. Such a remand does not, of course, invalidate the jury's penalty verdict.

1. Elwood Barclay (B)	FSC upheld 3-17-77. Remanded for resentencing by FSC per Gardner 9-7-78. Resentenced to death 4-18-80.
2. Henry Brown (B)	FSC reduced to 25-year life 2-1-79.
3. Franz Buckrem (W)	FSC reduced to 25-year life 1-26-78.
4. Jackson Burch (B)	FSC reduced to 25-year life 3-10-77.
5. Walter Carnes (B)	Committed suicide on death row. Case dismissed by FSC, 7-15-75.
6. Glen Chambers (W)	FSC reduced to 25-year life 11-4-76.
7. Ernest John Dobbert, Jr. (W)	FSC upheld 1-14-76. USSC upheld 6-15-77. FSC remanded for resentencing per Gardner, 4-2-78. Resentenced to death 6-78. FSC upheld second death sentence 7-5-79. Cert. den. 6-9-80.
8. Howard Virgil Lee Douglas (W)	FSC upheld 2-18-76. Cert. den. 4-77. Death warrant signed 7-17-79. Federal stay 7-24-79.
9. Daniel Wilbur Gardner (W)	FSC upheld 2-26-75. USSC reversed 3-22-77 (Gardner v. Florida). Resentenced to 25-year life 5-77.
10. Jesse Lamar Hall (W)	FSC remanded for new trial 12-20-79. Allowed to plead guilty and receive 25-year life, 6-80.
11. Darrell Hoy (W)	FSC upheld 12-2-77. Granted executive clemency 6-12-80.
12. Sonia Jacobs (W)	FSC reduced to 25-year life 3-26-81.
13. Jimmie Lee Jones (B)	FSC reduced to 25-year life 5-12-76.
14. Robert Fieldmore Lewis (W)	FSC remanded for resentencing 4-2-81.
15. James McCaskill (B)	FSC reduced to 25-year life 4-7-77.

16. James McCray (B) — FSC upheld 10-30-80.

17. Rodney Malloy (W) — FSC reduced to 25-year life 12-20-79.

18. Jack Neary (W) — FSC reduced to 25-year life 5-15-80.

19. Eddie Odom (W) — First review in FSC pending.

20. Michael Provence (W) — FSC reduced to 25-year life 7-21-76.

21. Anthony Eugene Sawyer (B) — FSC upheld 2-19-75. Trial judge subsequently reduced to 25-year life 8-6-76.

22. William Horace Shue (W)* — FSC reduced to 25-year life 12-8-78.

23. Darius Slater (B) — FSC reduced to 25-year life 6-25-75.

24. Joe Spaziano (W) — FSC remanded for resentencing 1-8-81.

25. Lloyd Swan (B) — FSC reduced to 25-year life 9-3-75.

26. Joseph Taylor (B) — FSC reduced to 25-year life 5-15-75.

27. Mack Reed Tedder (W) — FSC reduced to 25-year life 11-19-75.

28. Larry Thompson (W) — FSC reduced to 25-year life 1-21-76.

29. Ernest Coyle Walker (W) — Died on death row 3-17-77. Possible suicide.

30. Clifford Williams (B) — FSC reduced to 25-year life 6-12-80.

31. Otis Williams (B) — FSC reduced to 25-year life 4-7-77.

32. William Thomas Zeigler (W) — First review in FSC pending.

DEATH SENTENCES IMPOSED IN FLORIDA AFTER JURY PENALTY VERDICTS OF LIFE IMPRISONMENT SINCE 9-11-77:

33. Alonzo Winfred Bryant (B)
Sentence imposed 11-22-77. — First review in FSC pending.

34. John William Barfield (W)
Sentence imposed 3-3-78. — First review in FSC pending.

35. Robert Lewis Buford (B)
Sentence imposed 3-31-78. — First review in FSC pending.

36. Roy McKennon (B)
Sentence imposed 4-21-78. — First review in FSC pending.

37. James L. Phippen (W)
Sentence imposed 6-22-78. — FSC reduced to 25-year life 10-23-80.

38. Beauford White (B)
Sentence imposed 6-22-78. — FSC upheld 3-20-81.

39. David Monroe Goodwin (W)
Sentence imposed 8-18-78. — First review in FSC pending.

*Death sentence of William Horace Shue was imposed for sexual battery upon a child which did not result in the death of the victim, an offense punishable by death or life imprisonment without opportunity for parole during the first 25 years of the sentence, see Section 794.011 (2), Florida Stats. (1977).

40. Durham Eldon Stokes (W) Sentence imposed 8-25-78.	First review in FSC pending.
41. William Glenn Welty (W) Sentence imposed 10-31-78.	First review in FSC pending.
42. Raleigh Porter (W) Sentence imposed 12-11-78.	First review in FSC pending.
43. Guy Ennis Smith (W) Sentence imposed 12-21-78.	First review in FSC pending.
44. Marvin Edwin Johnson (W) Sentence imposed 1-12-79.	FSC upheld 12-11-80.
45. Robert D. Heiney (W) Sentence imposed 3-29-79.	First review in FSC pending.
46. Thomas McCampbell (B) Sentence imposed 4-24-79.	First review in FSC pending.
47. Soloman Webb (B) Sentence imposed 11-16-79.	First review in FSC pending.
48. William Howe Gilvin (W) Sentence imposed 1-4-80.	First review in FSC pending.
49. Bernard Bolander (W) Sentence imposed 4-25-80.	First review in FSC pending.
50. Donald Albert Walsh (W) Sentence imposed 6-26-80.	First review in FSC pending.
51. Gregory Scott Engle (W) Sentence imposed 8-17-79.	First review in FSC pending.
52. Rufus Stevens (W) Sentence imposed 8-17-79.	First review in FSC pending.
53. Earnest Lee Miller (W) Sentence imposed 1-30-80.	First review in FSC pending.
54. Michael E. Canady (W). Sentence imposed 6-20-80.	First review in FSC pending.
55. Bobby Earl Lusk (W) Sentence imposed 2-5-80.	First review in FSC pending.
56. Gregory Mills (B) Sentence imposed 4-18-80.	First review in FSC pending.
57. Ervin McCray (B) Sentence imposed 8-25-80.	First review in FSC pending.
58. Ricky Washington (B) Sentence imposed 9-15-80.	First review in FSC pending.
59. Dan Edward Routly (W) Sentence imposed 11-24-80.	First review in FSC pending.
60. Connie Livingston (B) Sentence imposed 10-10-80.	First review in FSC pending.
61. Durwin Norris Sentence imposed 3-12-81.	First review in FSC pending.

NOTE: Letters after names show race of defendant: (B)=Black, (W)=White.

Under Section 775.082 (1) (Florida Stats., 1977), the only available penalties for first degree murder or sexual battery on a child are death or life imprisonment without opportunity for parole during the first 25 years of the sentence. In this list, the sentence provided as an alternative to the death penalty is referred to as "25-year life."

APPENDIX D

DEATH SENTENCES IMPOSED IN FLORIDA AFTER JURY PENALTY VERDICTS OF LIFE IMPRISONMENT: CURRENT DISPOSITIONS

In the list which follows, the abbreviation "FSC" means Florida Supreme Court, while "USSC" means United States Supreme Court. In some of these cases, death sentences have been vacated by the Florida Supreme Court and then reimposed on remand by the trial judge after a "Gardner hearing" where the accused may rebut or respond to any previously undisclosed material used as a basis for the original death sentence, see Gardner v. Florida, 430 U.S. 349, 357 (1977).

A. Under Death Sentence Affirmed By FSC

1. Howard Virgil Lee Douglas	FSC Affirmed: Douglas v. State, 328 So.2d 18 (1976); FSC Denied Post-Conviction Relief: Douglas v. State, 373 So.2d 895 (1979).
2. Ernest John Dobbert, Jr.	FSC Affirmed: Dobbert v. State, 328 So.2d 433 (1976); USSC Affirmed: Dobbert v. Florida, 432 U.S. 282 (1977); FSC Affirmed on resentencing after Gardner hearing and new death sentence from trial court: Dobbert v. State, 375 So.2d 1069 (1979).
3. Elwood Clark Barclay	FSC Affirmed: Barclay v. State, 343 So.2d 1266 (1977); now under resentence of death after Gardner hearing; direct review by FSC pending.
4. James McCray	FSC Affirmed: McCrae v. State, ___ So.2d ___ (Case.No. 45894, Oct. 30, 1980; rehearing denied, April 9, 1981).
5. Marvin Edwin Johnson	FSC Affirmed, Johnson v. State, 393 So.2d 1069 (1980).
6. Beauford White	FSC Affirmed, White v. State, ___ So.2d ___ (Case No. 54292, March 20, 1980).

B. Death Sentenced Reversed By USSC After FSC Affirmance, Then Reduced To Life Imprisonment By Florida Courts.

7. Daniel Wilbur Gardner	FSC Affirmed: Gardner v. State, 313 So.2d 675 (1975); USSC Reversed: Gardner v. Florida, 430 U.S. 349 (1977).

C. Death Sentence Reduced To Life Imprisonment By Trial Judge After FSC Affirmance

8. Anthony Eugene Sawyer — FSC Affirmed: Sawyer v. State, 313 So.2d 680 (1975); Reduced by trial judge, Aug. 1976.

D. Death Sentence Reduced To Life Imprisonment By Executive Clemency After FSC Affirmance

9. Darrell Edwin Hoy — FSC Affirmed: Hoy v. State, 353 So.2d 826 (1977); executive clemency granted, June 12, 1980.

E. Death Sentence Reduced To Life Imprisonment By FSC

10. Joseph Taylor — FSC Reduced: Taylor v. State, 294 So.2d 648 (1974).

11. Darius Slater — FSC Reduced: Slater v. State, 316 So.2d 539 (1975).

12. Lloyd Swan — FSC Reduced: Swan v. State, 322 So.2d 485 (1975).

13. Mack Reed Tedder — FSC Reduced: Tedder v. State, 322 So. 908 (1975).

14. Larry Thompson — FSC Reduced: Thompson v. State, 328 So.2d 1 (1976).

15. Jimmie Lee Jones — FSC Reduced: Jones v. State, 332 So.2d 615 (1976).

16. Michael Edward Provence — FSC Reduced: Provence v. State, 337 So.2d 783 (1976).

17. Glen Stark Chambers — FSC Reduced: Chambers v. State, 339 So.2d 204 (1976).

18. Jackson Burch — FSC Reduced: Burch v. State, 343 So.2d 831 (1977).

19. James McCaskill — FSC Reduced: McCaskill v. State, 344 So.2d 1276 (1977).

20. Otis Williams — FSC Reduced: Williams v. State, 344 So.2d 1276 (1977).

21. Franz Peter Buckrem — FSC Reduced: Buckrem v. State, 355 So.2d 111 (1978).

22. William Horace Shue, Jr. — FSC Reduced: Shue v. State, 366 So.2d 387 (1978).

23. Henry Brown — FSC Reduced: Brown v. State, 367 So.2d 616 (1979).

24. Rodney Malloy — FSC Reduced: Malloy v. State, 382 So.2d 1190 (1979).

25. Jack Neary — FSC Reduced: Neary v. State, 384 So.2d 881 (1980).

26. Clifford Williams, Jr. — FSC Reduced: Williams v. State, 386 So.2d 536 (1980).

27. James Leroy Phippen — FSC Reduced: Phippen v. State, 389 So.2d 991 (1980).

28. Sonia Jacobs — FSC Reduced: Jacobs v. State, ___ So.2d ___ (Case No. 50175, March 26, 1981).

F. Death Sentence Remanded To Trial Court For Reconsideration After FSC Reversal

29. Joseph Robert Spaziano — FSC Remanded For Resentencing: Spaziano v. State, 393 So.2d 1119 (1981).

30. Robert Fieldmore Lewis — FSC Remanded For Resentencing: Lewis v. State, ___ So.2d ___ (Case No. 30851, April 2, 1981).

G. Conviction Reversed By FSC, Defendant Permitted On Retrial To Plead Guilty And Receive Life Sentence

31. Jesse Lamar Hall — FSC Reversed Conviction: Hall v. State, 381 So. 2d 683 (1979); pled guilty on retrial and received life sentence, June, 1980.

H. Death Sentence Pending First Review In FSC

32. Eddie Odom

33. Alonzo Winfred Bryant

34. John William Barfield

35. Roy McKennon

36. David Monroe Goodwin

37. Durham Eldon Stokes

38. William Glenn Welty

39. William Thomas Zeigler

40. Raleigh Porter

41. Guy Ennis Smith

42. Robert D. Heiney

43. Thomas McCambell

44. Gregory Scott Engle

45. Rufus Stevens

46. Robert Lewis Buford

47. Solomon Webb

48. Bernard Bolander

49. William Howe Gilvin

50. Donald Albert Walsh

51. Earnest Lee Miller

52. Michael E. Canady

53. Bobby Earl Lusk

54. Gregory Mills

55. Ervin McCray

56. Ricky Washington

57. Dan Edward Routly

58. Connie Livingston

59. Durwin Norris

I. Suicide Or Possible Suicide While Under Death Sentence Before First Review Of Sentence In FSC Was Decided

60. Walter Carnes — Committed suicide, 1975; See Carnes v. State, Case No. 46,673, motion to dismiss filed July 14, 1975, and order entered July 15, 1975.

61. Ernest Coyle Walker — Possible suicide, March 1977; cause of death uncertain, and accident or homicide not excluded.

SUMMARY OF CASE DISPOSITIONS

Florida Death Sentences After Jury Life Verdicts

A. Under Death Sentence Affirmed By FSC----------6*

B. Death Sentence Reversed By USSC After FSC Affirmance, Then Reduced To Life Imprisonment By Florida Courts----------1

C. Death Sentence Reduced To Life Imprisonment By Trial Judge After FSC Affirmance----------1

D. Death Sentence Reduced To Life Imprisonment By Executive Clemency After FSC Affirmance----------1

E. Death Sentence Reduced To Life Imprisonment By FSC----------19

F. Death Sentence Remanded To Trial Court For Reconsideration After FSC Reversal----------2*

G. Conviction Reversed By FSC, Defendant Permitted On Retrial To Plead Guilty And Receive Life Sentence----------1

H. Death Sentence Pending First Review In FSC----------28*

I. Suicide Or Possible Suicide While Under Death Sentence Before First Review Of Sentence In FSC Was Decided----------2

TOTAL NUMBER OF CASES 61

TOTAL NUMBER OF PERSONS POTENTIALLY AFFECTED 36*

(Categories marked (*) are potentially affected by Petitioner's claims challenging the constitutionality of death sentences imposed after jury decisions for life imprisonment.)

Summary Of FSC Case Dispositions

Death Sentences After Jury Life Verdicts

AFFIRMED	9	(6)
REDUCED TO LIFE IMPRISONMENT	19	
REVERSED AND REMANDED FOR RECONSIDERATION BY TRIAL JUDGE	2	(2)
CONVICTION REVERSED, DEFENDANT PLED GUILTY AND RECEIVED LIFE SENTENCE ON RETRIAL	1	
FIRST REVIEW OF DEATH SENTENCE NOW PENDING	28	(28)
SUICIDE OR POSSIBLE SUICIDE, FIRST REVIEW MOOTED	2	
TOTAL NUMBER OF CASES	61	(36)

(Numbers in parenthesis ( ) show persons potentially affected by Petitioner's constitutional claims, including 34 persons presently under sentence of death, and two persons whose death sentences have been remanded for reconsideration by the trial court.)

THIS DATA IS COMPILED AS OF APRIL 15, 1981

JUDGE/JURY ROLES IN CAPITAL PENALTY DETERMINATION
A Survey Of National Legislative Practice, 1972-1981

1. Jury Life Verdict Binding

ARKANSAS	Crim. Code (1977) §41-1301-1302	L
CALIFORNIA	Penal Code (1979) §190.3-190.4	U
COLORADO	Rev. Stats. (1973) §16-11-103*	L
CONNECTICUT	Gen. Stats. Ann. (1979 Pck.Pt.) §53a-46a	U (?)
DELAWARE	Code Ann. (1977 Cum.Supp.) §11-4209	L
GEORGIA	Code Ann. (1977) §26-3102, §27-2302	L
ILLINOIS	Ann. Stats. (1979) §38-9-1	L
KENTUCKY	Rev. Stats. (1973 Cum.Supp.) §532.025*	U (?)
LOUISIANA	Code of Crim. Proc. (Pck.Pt. 1979) Art. 905.8	L
MARYLAND	Ann. Code. (1978 Cum.Supp.) Art. 27, §413	L
MASSACHUSETTS	1979 Chapter 488, Section 55	L
MISSISSIPPI	Code (1978 Cum.Supp.) §99-19-101	L
MISSOURI	Crim. Code (1979 Spec. Pamph.) §565.006	L
NEVADA	Rev. Stats.(1977) §175.554	U
NEW HAMPSHIRE	Rev. Stats. Ann. (1977 Supp.) §630.5	L
NEW MEXICO	Stats. Ann. (1979 Supp.) 31-20A-3	L
NORTH CAROLINA	Gen. Stats. (1978) §15A-2000	L
OKLAHOMA	Stats. Ann. (1973-1979 Pck.Pt.) §21-701.11	L
PENNSYLVANIA	Act No. 1978-141: §18-1311	L
SOUTH CAROLINA	Code Ann. (1973 Cum.Supp.) §16-3-20	L
SOUTH DAKOTA	State Laws 1979 Chapter 160: §23A-27A-4	L (?)
TENNESSEE	Code Ann. (1973 Cum. Supp.) §39-2404	L
TEXAS	Code Crim. Proc. Art. 37.071	T
UTAH	Crim. Code (1978) §76-3-207	L
VIRGINIA	Code (1979 Cum.Supp.) §19.2-264.4	L
WASHINGTON	Rev. Code Ann. (1978 Pck.Pt.) §10.94.020	U (?)
WYOMING	Stats. (1977) §6-4-102	L
UNITED STATES	49 USC §1473 (1976) (Antihijacking Act)	U

2. Jury Life Verdict Not Binding

FLORIDA	Stats. Ann. (1977) §921.141	M
INDIANA	Stats. Ann. (1979) §35-50-2-9	U

3. Judge Sentences After Jury Finding Of Aggravation

ALABAMA	Code (1975) §13A-5-33*
OHIO	Rev. Code Ann. (1975) §2929.03*

4. Penalty Determination By Judge Alone

ARIZONA	Rev. Stats. Ann. (1978 Supp.Pamph.) §13-454
IDAHO	Code (1978 Cum.Pck.Supp.) §19-2515
MONTANA	Rev. Codes (1977 Interim Supp.) §95-2206.6
NEBRASKA	Rev. Stats. (1975) §29-2520
OREGON	Rev. Stats. (1979) §163.116**

LEGENDS AND NOTATIONS

L---Life sentence unless jury unanimously agrees on death
U---Unanimous verdict required for either life or death
M---Majority suffices for verdict of either life or death
T---Unique Texas procedure--penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer each question "yes"; 10 jurors may answer any question "no" and prevent death penalty.

LEGENDS AND NOTATIONS CONT. NEXT PAGE

*Ohio and Colorado statutes found unconstitutional because mitigating circumstances limited--see Lockett v. Ohio, 438 U.S. 586 (1978). Colorado in August of 1979 amended its statute to comply with Lockett by allowing unlimited consideration of mitigation; see Rev. Stats. (1979 Cum.Supp.), Section 16-11-103.

#The Kentucky statute is not absolutely clear in its language concerning the finality of a jury decision against death, but in Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) the Supreme Court of Kentucky construed the statute to require a jury finding of at least one aggravating circumstance in the penalty phase before the judge may consider imposing the death penalty. Since the statute calls for written findings of aggravating circumstances by the jury only "if its verdict be a recommendation of death," see Kentucky Rev. Stats. (1978 Cum.Supp.) Section 532.025 (3), it appears that a jury life decision is in effect binding under the Kentucky scheme.

@Alabama statute declared unconstitutional in Beck v. Alabama, ___U.S. ___, 100 S. Ct. 2382 (1980), because of prohibition of lesser offense instructions in capital cases under that statute.

**Oregon death penalty statute declared unconstitutional by Supreme Court of Oregon in State v. Quinn, 623 P.2d 630 (Or. 1981) on ground that making "deliberateness" of capital murder a fact to be determined by the trial judge alone in the penalty phase denied an accused the right to trial by jury.

(?) The Kentucky statute as interpreted by the Supreme Court of Kentucky requires a unanimous jury verdict for death, but the consequences of a jury's inability to agree on the penalty issue are not defined. The Connecticut and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed; the Washington statute does not specify the result if the jury fails to agree on the penalty issue.

Overall Categories

JURY LIFE VERDICT BINDING	28
JURY LIFE VERDICT NOT BINDING	2
JUDGE SENTENCES AFTER JURY FINDING OF AGGRAVATION	2
JUDGE DETERMINES PENALTY ALONE	5
TOTAL JURISDICTIONS	37

Jury Participates In Determining Aggravation

YES	32
NO	5
TOTAL JURISDICTIONS	37
RESULT IN FAVOR OF DEFENDANT BINDING	30
RESULT IN FAVOR OF DEFENDANT NOT BINDING	2
SUBTOTAL OF JURISDICTIONS	32

Jury Participates In Actual Sentence Decision

YES	30
NO	7
TOTAL JURISDICTIONS	37
RESULT IN FAVOR OF DEFENDANT BINDING	28
RESULT IN FAVOR OF DEFENDANT NOT BINDING	2
SUBTOTAL OF JURISDICTIONS	30

METHOD OF STUDY: For each jurisdiction restoring a discretionary death penalty since Furman v. Georgia, 408 U.S. 238 (1972), an attempt was made to find the latest statute. Since the purpose here is to survey the "evolving standards of decency" as reflected by the norm of national legislative action, a few statutes such as those of Colorado and Ohio are included which have been declared or may be declared unconstitutional because they do not permit the full consideration of all mitigating circumstances which the defendant may present at the penalty proceedings.

Rules On Jury Penalty Vote

LIFE UNLESS UNANIMOUS FOR DEATH (L)	21
UNANIMITY FOR ANY VERDICT REQUIRED (U)	7*
MAJORITY SUFFICES FOR LIFE OR DEATH (M)	1*
TEXAS PROCEDURE--SPECIAL PENALTY QUESTIONS	1
SUBTOTAL OF JURISDICTIONS	30

* (U) includes Indiana (life not binding); (M) includes Florida (life not binding). The majority rule in Florida is not specifically connected with the nonbinding nature of the verdict as the statute is now construed, since from 1872 to 1972 the same majority rule applied but the verdict was final.

THIS SURVEY IS BASED ON INFORMATION AVAILABLE TO APRIL 15, 1981.

UTAH EXECUTIONS AND DEATH SENTENCES--JURY RECOMMENDATIONS (1948-1972)

Previous to the decision of Furman v. Georgia, 408 U.S. 238 (1972), the State of Utah had a death penalty statute which made the ultimate penalty mandatory unless the jury recommended mercy, and in cases where the jury did recommend mercy extended discretion to the trial judge to impose a penalty of death or of life imprisonment. It may be noted that under Utah law death was the normal penalty for first degree murder, and life imprisonment the exception which thus required agreement by both judge and jury.

There follows a list of every defendant whose death sentence was executed in Utah between 1948 and 1967 (when a moratorium on executions began which was to last nationwide for 10 years while federal constitutional questions were being resolved).

Also, there are listed reports of two Utah cases (in 1941 and 1951) where a death sentence was sustained by the Utah Supreme Court after a jury recommendation of mercy, but was not carried out.

The records show that at least since 1948, there were no executions in Utah after jury recommendations of mercy.

DEFENDANTS EXECUTED IN UTAH: 1948-1967

Name	Date of verdict	Dist. Ct. #	Appel. Rpt.
1. Mares, Elisio J. Executed 9/10/51	March 7, 1947	Summit Cnty. 3rd Dist. Ct. #420	State v. Mares, 192 P.2d 861 (Ut. 1948)
2. Gardner, Ray Dempsey Executed 9-29-51	Dec. 13, 1949	Weber Cnty. 2nd Dist. Ct. #4803	State v. Gardner, 230 P.2d 559 (Ut. 1951)
3. Neal, Don Jesse Executed 7/1/55	----------	----------	State v. Neal, 262 P.2d 756, 759 (Ut. 1953) Utah S. Ct. noted lack of jury mercy recommendation id. at 759.

Name	Verdict Date	Dist. Ct. #	Appel. Rpt.
4. Braasch, Vern A. Executed 5/11/56	Dec. 9, 1949	Iron Cnty. 5th Dist. Ct. #171	State v. Braasch, 229 P.2d 289 (Ut. 1951)
5. Sullivan, Melvin L. Executed 5/11/56	Dec. 9, 1949	Same as Braasch (co-defendant)	Sub nomine Braasch
6. Kirkham, Barton K. Executed 6/7/58	----------	----------	State v. Kirkham, 319 P.2d 859, 862 (Ut. 1958). Absence of jury mercy recommendation noted in opinion, id. at 862.
7. Rodgers, James W. Executed 3/30/60	Dec. 14, 1957	San Juan Cnty. 7th Dist. Ct. Crim. #243	State v. Rodgers, 329 P.2d 1075 (Ut. 1958)

NOTE: In two cases, those of Neal and Kirkham, the opinion of the Utah Supreme Court itself mentions the choice of the jury for a verdict of first degree murder without rather than with a recommendation of mercy; thus only the appellate citation is given for these cases. Information on the other five cases was obtained from the relevant Judicial District Courts of Utah, where the defendants were tried. In each of these cases, trial records revealed a jury verdict of first degree murder without recommendation for mercy. This is especially striking because customarily Utah juries were provided with separate verdict forms for each possible decision, including guilty of first degree murder with a recommendation for life imprisonment.

DEFENDANTS WITH DEATH SENTENCES AFFIRMED IN UTAH AFTER LIFE RECOMMENDATIONS WHO WERE NEVERTHELESS NOT EXECUTED (THIS LIST IS NOT NECESSARILY EXHAUSTIVE, ALTHOUGH THERE IS NO SPECIFIC INDICATION THAT OTHER CASES EXIST).

Name	Appellate Opinion Aff'g Sentence	Date Commuted
1. Markham, John	State v. Markham, 112 P.2d 496, see 496-497 (Ut. 1941).	September 22, 1941
2. Matteri, Fred	State v. Matteri, 225 P.2d 325, see 329-330 (Ut. 1950).	June 11, 1951

NOTE: Commutation dates based on records of Utah State Prison in case of Fred Matteri, and on a document in the Utah State Archives reporting the granting of executive clemency to John Markham: Memorandum, Office of the Attorney General (September 24, 1941) (statement of actions taken by Board of Pardons in meeting of September 20-22, 1941), p. 1, Paragraph 5, Case No. 7083. The records of Utah State Prison also confirm the accuracy and completeness of the above list of Utah executions 1948-1972, which is also available in Bowers, Executions in America 385 (1974).

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No. 80-6610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

ORIGINAL COPY

MARVIN EDWIN JOHNSON,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioner,

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STATE OF FLORIDA,

Respondent.

_____/

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 393 So.2d 1069 (Fla. 1981).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

The questions presented below are different facets on the question presented on page vii of the petition and are restated from the issues set forth under the subheading REASONS FOR GRANTING THE WRIT beginning on page 5 of the petition.

I

THE IMPOSITION OF THE DEATH PENALTY FOLLOWING AN ADVISORY RECOMMENDATION OF LIFE BY THE JURY DOES NOT VIOLATE ANY PROVISION OF THE UNITED STATES CONSTITUTION.

A. The Imposition of Death After a Jury Recommendation of Life Imprisonment, Although Contrary to the Procedure Followed in Other States, Does not Deprive Petitioner of any Rights Under the Sixth, Eighth or Fourteenth Amendments.

B. Florida's Practice, as Interpreted by The Supreme Court of Florida, Does not Violate the Federal Constitution.

C. Florida's Practice Authorized by its Death Penalty Statute, of Permitting a Trial Judge to Override a Jury Advisory Recommendation of Life Imprisonment Does not Violate the Federal Constitution.

D. Florida's Practice of Permitting a Trial Judge to Override a Jury Advisory Recommendation Does not Present any Double Jeopardy Problem Under the Fifth and Fourteenth Amendments.

E. Florida's Practice of Permitting a Trial Judge to Override a Jury Advisory Recommendation is Constitutional and Fair to all Parties Concerned.

F. The Imposition of the Death Penalty by a Trial Judge by Overriding the Advisory Recommendation of the Jury Neither Conflicts With any Plan of Limited and Representative Government nor Violates the Principle of Judicial Restraint.

STATEMENT OF THE CASE

Respondent has no quarrel with petitioner's statement of the case and accepts same as set forth in his Petition on pp. 4, 5 thereof.

ARGUMENT

I

THE IMPOSITION OF THE DEATH PENALTY FOLLOWING AN ADVISORY RECOMMENDATION OF LIFE BY THE JURY DOES NOT VIOLATE ANY PROVISION OF THE UNITED STATES CONSTITUTION.

Petitioner asks this Court to exercise its jurisdiction to review a feature of the Florida

capital-sentencing scheme which twice received the blessing and praise of this Court. In Proffitt v. Florida, 428 U.S. 242 (1976), this Court conducted a thorough review of § 921.141, Florida Statutes, to determine whether it was constitutional in light of Furman v. Georgia, 408 U.S. 238 (1972). It is evident from the following statements of this Court that the decision of the Florida Legislature to empower judges rather than juries to impose the sentence in capital cases was entirely constitutional, as was the decision to provide that the jury's recommendation of sentence was to be advisory only:

> The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 US 510, 519 n 15, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.
>
> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted."

428 U.S., at 252, 253. It cannot seriously be contended that these conclusions are to be ignored or cast in doubt

merely because the jury in Proffitt had recommended the sentence of death.

The following year this Court rendered its decision in Dobbert v. Florida, 432 U.S. 282 (1977), a capital case in which the judge had sentenced the defendant to death over the recommendation of the jury. While it is true that Dobbert's principal attack was upon the ex post facto application of the new statute to him, this Court again gave specific approval to the aspect of the statute challenged by petitioner:

> Hence, petitioner's speculation that the jury would have recommended life were the prior procedure in effect is not compelling. We must compare the two statutory procedures in toto to determine if the new may be fairly characterized as more onerous. Under the old procedure, the death penalty was "presumed" unless the jury, in its unbridled discretion, made a recommendation for mercy. The Florida Legislature enacted the new procedure specifically to provide the constitutional procedural protections required by Furman, thus providing capital defendants with more, rather than less, judicial protection. These protections, upheld by this Court in Proffitt, provided are substantial. A separate hearing is held; the defendant is allowed to present any relevant mitigating evidence. The jury renders an advisory verdict based upon its perception of aggravating and mitigating factors in the case. The court makes the final determination, but may impose death only after making a written finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> Finally, in what may be termed a tripartite review, the Florida Supreme Court is required to review each sentence of death. This required review, not present under the old procedure, is by no means perfunctory; as was noted in Proffitt, as of that time the Florida Supreme Court had vacated 8 of the 21 death sentences that it had reviewed to that date. 428 US, at 253, 49 L Ed 2d 913, 96 S Ct 2960. Perhaps most importantly, the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life:

> "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So 2d 908, 910 (1975)(emphasis added)(cited with approbation in Proffitt v. Florida, 428 US, at 249, 49 L Ed 2d 913, 96 S Ct 2960).
>
> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder. Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury; on the otherhand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old staute.

432 U.S., at 294-296.

As will be more fully discussed below, petitioner's attack upon the constitutionality of the Florida statute is based upon a single faulty premise; that an advisory recommendation of sentence by a jury is equivalent to a jury verdict of acquittal or guilt. It is from this faulty premise that petitioner contends that Florida's death penalty statute violates centuries of jurisprudential tradition, relying as he must, upon judicial opinions and legal commentary which uphold the right to a trial by jury and which, quite clearly, are not relevant to any issue raised in this proceeding.

Since petitioner has thus failed to present to this Court any issue which it has not already decided to his detriment or any compelling reason why it should re-review its recent holdings, this Court should refuse to grant the

writ.

A. The Imposition of Death After a Jury Recommendation of Life Imprisonment, Although Contrary to the Procedure Followed in Other States, Does not Deprive Petitioner of any Rights Under the Sixth, Eighth or Fourteenth Amendments.

While petitioner has provided this Court with the benefit of his research into the capital punishment statutes of the various states, he has utterly failed to demonstrate why the results thereof should compel this Court to reverse its decision in Proffitt and find the Florida capital punishment statute constitutionally defective insofar as it authorizes the sentencing court to impose the sentence of death notwithstanding the recommendation of life imprisonment by the jury.[1]

Petitioner would have this Court find a constitutional defect from the fact that the majority of states do not permit the sentencing court to override the recommendation of the jury. Respondent finds nothing in the United States Constitution which requires uniformity in this regard and would suggest that it would be abhorrent to concepts of federalism and judicial restraint for this Court to find error of constitutional dimension in the decision of the Florida Legislature to enact a capital-sentencing scheme different from that of a majority of states.[2] Certainly

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[1] While petitioner is only concerned with the aspect of the Florida capital-sentencing scheme which empowers the sentencing judge to override the recommendation of the jury in favor of life imprisonment, the Florida scheme also seeks to assure that the death sentence is imposed on the basis of reason rather than emotion or caprice by allowing the judge to ignore a jury's recommendation of death. Proffitt, 428 U.S., at 252; State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

[2] As petitioner admits, the State of Indiana has likewise enacted a statute, in response to Furman, which permits the sentencing judge to override the advisory recommendation of the jury, regardless of whether that recommendation is in favor of life or death. In fact the Indiana Supreme Court recently upheld this aspect of the Indiana death penalty statute [Ind. Code § 35-50-2-9 (Burns 1979 Repl.)] in Judy v. State, 416 N.Ed.2d 95, 108 (Ind. 1981).

this Court has not heretofore required such uniformity in response to Furman v. Georgia, supra.[3] In fact, this Court has not required any jury involvement whatsoever in capital sentencing. Lockett v. Ohio, 438 U.S. 586, 609 n. 15 (1978). Furthermore it is to be remembered that "the States have always enjoyed 'wide leeway in dividing responsibility between judge and jury in criminal cases.'" Chaffin v. Stynchombe, 412 U.S. 17, 22 (1973), quoting from Spencer v. Texas, 385 U.S. 554 (1967).

Petitioner next suggests as an "additional indicator of unconstitutionality" the rarity with which death sentences were imposed and executed following jury recommendations of life in the states of Utah and New York prior to Furman. (Petitioner's brief at P. 10) Frankly, we cannot see how this indicator suggests a constitutional problem with the Florida statute. The records of the Florida Supreme Court disclose that as of March 1, 1980 there were approximately 110 death penalty cases pending review in the Florida Supreme Court and that the Court has received an average of 30 to 35 additional death cases per year since the present statute was enacted. England, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. of Fla.L.R. 147, 162 (1980). Consequently, accepting petitioner's statement that the Court has presently pending before it 28 cases in which the death penalty was imposed over the recommendation of the jury, it is clear that in the far greater number of cases, the jury

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[3] See Gregg v. Georgia, 428 U.S. 153 (1976), (jury or judge, in cases tried without a jury, must find at least one aggravating factor and decide to impose the death penalty); Jurek v. Texas, 428 U.S. 262 (1976)(if sentencing jury answers a series of three questions in the affirmative, sentence of death must be imposed); Proffitt, supra, (jury weighs aggravating and mitigating circumstances and renders advisory sentence to sentencing judge who makes independent assessment of such circumstances prior to imposing sentence).

recommended death. (See petitioner's Appendix D, pp. 3d-4d). Furthermore, petitioner, by his own data, has shown that of 61 instances in which the sentencing judge has ever overridden the jury's recommendation of life, the Florida Supreme Court has to date upheld the sentence of death only 9 times.[4] The fact remains that a sentence of death imposed over the recommendation of the jury rarely survives Florida's tripartite procedure. Indeed, a sentence of death so imposed has never been executed in Florida. Petitioner's second indicator thus indicates nothing.

Petitioner then turns our attention to legal commentary. However, respondent wishes to emphasize that every text or article relied upon by petitioner was available to this Court prior to its decision in Proffitt and thus affords the Court no new guidance upon which to reverse Proffitt. Certainly this Court was aware of legal commentary on both sides of the issue as to whether a judge or jury should sentence a person to death when it reviewed the Georgia and Florida schemes which differed in this regard. Gregg v. Georgia, 428 U.S. 153, 189, 190(1976), and Proffitt, 428 U.S., at 252, n. 10. Thus, petitioner's "indexes of unconstitutionality" prove nothing.

B. Florida's Practice, as Interpreted by The Supreme Court of Florida, Does not Violate the Federal Constitution.

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[4] Gardner v. State, 313 So.2d 675 (Fla. 1975); Sawyer v. State, 313 So.2d 680 (Fla. 1975); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Barclay v. State, 343 So.2d 1266 (Fla. 1977); Hoy v. State, 353 So.2d 826 (Fla. 1977); Johnson v. State, 393 So. 2d 1069 (Fla. 1980); McCrae v. State, 395 So.2d 115 (Fla. 1980); and White v. State, ___ So.2d ___, Case No. 54, 292, March 20, 1980, rehearing pending. As petitioner shows in his appendices, the sentence of three of these were subsequently reduced to life imprisonment and of the remaining six, this Court has upheld the sentence of one, Dobbert v. Florida, 432 U.S. 282 (1977), and refused to review two others. Douglas, supra, cert.den., 429 U.S. 871 (1976), reh.den. 429 U.S. 1055 (1977), and Barclay, supra, cert.den., 439 U.S. 392 (1978).

In truth, what petitioner seeks under his second sub-point is an advisory opinion of this Court directed to the Florida Supreme Court and the Florida Legislature on the meaning of Furman. Of course, this Court has always steadfastly refused to exercise its extraordinary certiorari jurisdiction for such purpose. Muskrat v. United States, 219 U.S. 346 (1911).

Accordingly, even if the Florida Supreme Court was being overly cautious in its reading of Furman with respect to allowing the judge to override a jury recommendation of life imprisonment, that would not necessitate review by this court unless such action is repugnant to the United States Constitution. This, petitioner has utterly failed to demonstrate. Of course, respondent does not concede a misinterpretation by the Florida Supreme Court. This Court in Furman declared unconstitutional a death penalty scheme which afforded the sentencing authority too much unguided discretion, resulting in the imposition of the death penalty in a freakish and capricious manner. 408 U.S., at 390 (Stevens, J., concurring). It is the considered view of the Florida Supreme Court that if the sentencing court were bound by the recommendation of the jury, the death sentence in Florida might be freakishly imposed. Douglas v. State, 373 So.2d 895, 897 (Fla. 1979, and Johnson v. State, 393 So.2d 1069, 1074 (Fla. 1980).[5] This Court specifically recognized the wisdom of this determination by the Florida Legislature in Proffitt wherein this Court stated:

> And it would appear that judicial sentencing should lead, if anything, to even

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[5] The Florida Supreme Court gave early approval to the determination of the Florida Legislature that judges rather than juries should determine the sentence in capital cases by stating that "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

> greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

428 U.S., at 252.

Consequently, while it may be true that Furman does not mandate that a capital-sentencing scheme provide for judicial rather than jury sentencing, it is clear that Furman does not prohibit it. Certainly this Court made it clear in Proffitt that this aspect of the Florida statute does not run afoul of the Constitution as explicated in Furman as did the death penalty schemes struck in Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Coker v. Georgia, 433 U.S. 584 (1977); and Beck v. Alabama, 447 U.S. 625 (1980).[6] Respondent believes that it would have been difficult for the Court to have put a more positive stamp of approval on Florida's death penalty statute than the remarks quoted above from the Proffitt opinion.

C. Florida's Practice Authorized by its Death Penalty Statute, of Permitting a Trial Judge to Override a Jury Advisory Recommendation of Life Imprisonment Does not Violate the Federal Constitution.

Petitioner's third sub-point is based upon the flawed premise which underlies many of his contentions; that an advisory recommendation of life imprisonment by a

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[6] Woodson and Roberts involved mandatory impositions of the death penalty; Lockett involved an impermissible restriction upon the consideration of mitigating circumstances by the sentencing authority; Coker involved the impermissible application of the death penalty to the rape of an adult; Beck involved an impermissible prohibition of instructions of lesser included offenses in capital cases.

jury is equivalent to a verdict of not guilty.[7] Consequently, virtually all of the authority relied upon by petitioner is totally irrelevant to the issue raised. Were we here involved with a situation in which the trial judge had convicted petitioner over the jury's verdict of not guilty, we could see the relevancy of cases relating to the function of juries in rendering verdicts free from government oppression. But this isn't the case. Consequently, petitioner's arguments go wide of the mark.

Turning to petitioner's main contention under this sub-point, respondent answers that this Court has already considered the implications of Witherspoon v. Illinois, 391 U.S. 510 (1968), upon the Florida capital sentencing scheme. In Proffitt, the Court remarked: "This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 US 510, 519 n 15, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368 (1968), but it has never suggested that jury sentencing is constitutionally required." 428 U.S., at 252. Unlike those states which do not provide for any participation by a jury in capital sentencing,[8] Florida does permit the sentencing judge to be guided by the opinion of the jury, thus furthering the important societal function to which this Court referred in Witherspoon. However, the fact that Florida has chosen to assure greater reliability in capital sentencing by intrusting that awesome task to trial judges

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[7] A more thorough refutation of this premise is contained under part D. of this Response.

[8] Of the five states which exclude jury participation in capital sentencing (see petitioner's Appendix E), the highest court in three have upheld their capital punishment statutes against the contention that the exclusion of juries from the sentencing determination was unconstitutional. State v. Simants, 250 N.W.2d 881, 887 (Neb. 1977), citing Proffitt in upholding the Nebraska statute; State v. Coleman, 605 P.2d 1000, 1017 (Mont. 1979), upholding the Montana statute; and State v. Richmond, 560 P.2d 41, 51 (Ariz. 1976), and State v. Watson, 586 P.2d 1253, 1259 (Ariz. 1978), upholding the Arizona statute.

does not in any way constitute a violation of the United States Constitution as applied in Witherspoon. Simply put, Witherspoon requires that if a State chooses to involve a jury in its capital sentencing procedures, it may not constitutionally exclude jurors opposed to capital punishment and thereby produce "a jury uncommonly willing to condemn a man to die." 391 U.S. 521.

Petitioner's attack upon the standard by which the Florida Supreme Court reviews death sentences imposed over the recommendation of the jury as announced in Tedder v. State, 322 So.2d 908 (Fla. 1975), is a misstatement of the court's rationale. The court in Tedder was not concerned that the jury's recommendation might be based upon scruples against the death penalty; rather, the court was concerned that the recommendation may have been based upon caprice or emotion instead of reason. But because of the importance of the jury as the conscience of the community, the court imposed a very exacting standard of review:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

322 So.2d, at 910.

As earlier stated, a sentence of death has rarely survived Florida's tripartite capital-sentencing scheme and it is evident that the Tedder standard approvingly referred to in Proffitt, 428 U.S., at 249, has significantly contributed to that fact. The Florida Supreme Court applies that standard in its careful review of the written findings of the sentencing judge in support of the sentence imposed and petitioner has not suggested that the Florida Supreme Court has failed to properly exercise this important function under the statute.

Witherspoon simply has no relevancy to the issue of whether a judge can override an advisory recommendation of sentence by a jury. The statement of this Court in the footnote to which petitioner alludes merely demonstrates the concern that a jury used in a capital-sentencing scheme must be representative, regardless of whether the judge is bound by the jury's recommendation. Since the new Illinois statute allowed the judge to override a recommendation of death, it was not necessary for the court to broaden its statement beyond the facts of the case.

D. Florida's Practice of Permitting a Trial Judge to Override a Jury Advisory Recommendation Does not Present any Double Jeopardy Problem Under the Fifth and Fourteenth Amendments.

This Court's reasoning and holdings in United States v. DiFrancesco, ___ U.S., ____,66 L.Ed.2d 328 (1980), and Swisher v. Brady, 438 U.S. 204 (1978), are dispositive of this issue as best respondent can comprehend the multifarious contentions made by petitioner. Even though his contentions are less clearly made here than below, they should similarly be rejected. Johnson, 393 So.2d, at 1074.[9] Perhaps before turning individually to

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[9] The court in Johnson relied upon its holding in Douglas, 373 So.2d at 897, wherein it stated:

> Although the precise foundation of a "double jeopardy" argument was not presented to the high court in Proffitt, that court not only understood the jury's role in Florida's scheme for imposing the death sentence but expressly approved its validity against a backdrop of Florida caselaw which established the framework for trial judges to override a jury's recommendation of a life sentence. See 428 U.S. at 249-53, 96 S.Ct. 2960. Plainly, the supreme court did not consider a jury recommendation of life imprisonment to be an acquittal of a death-appropriate crime, so as to bar imposition of a death sentence by the trial judge.

the seemingly unrelated factors which together are alleged to make petitioner's case a unique test of double jeopardy, it would be useful for respondent to broadly respond to petitioner's principal contention.

In DiFrancesco, this Court extensively reviewed the Double Jeopardy Clause of the Fifth Amendment and applied its analysis to a federal statute which authorized the government to appeal a sentence imposed upon a dangerous special offender and which authorized the imposition of a more severe sentence as a result of that appeal. While not factually analogous, many conclusions of the Court in DeFrancesco are particularly pertinent and instructive to the resolution of petitioner's contention.

Essentially petitioner would have this Court find that the Double Jeopardy Clause applies to his sentence insofar as the jury's recommendation constituted initial jeopardy which prohibited the sentencing judge from making his subsequent and independent determination with respect to imposition of the sentence of death. We begin our analysis with the application of double jeopardy to sentencing in general. In DeFrancesco, this Court set forth three separate constitutional protections under the guarantee against double jeopardy as follows:

> "That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (Footnotes omitted.) North Carolina v. Pearce, 395 US, at 717, 23 L Ed 2d 656, 89 S Ct 2072.

66 L.Ed.2d, at 340.

As we understand it, petitioner would have us address the first and third of these protections since

the second can have no application sub judice. Presumably then, petitioner would first have this Court rule that the jury's recommendation constituted an acquittal of a capital offense. Such a contention is without merit. As discussed in DiFrancesco, the Double Jeopardy Clause unequivocally prohibits a second trial following an acquittal. See Fong Loo v. United States, 369 U.S. 141 (1962), and Burks v. United States, 437 U.S. 1 (1978). Petitioner argues that the jury's advisory recommendation of life at his trial constituted an acquittal since an acquittal prevents retrial even if "the acquittal was based upon an egregiously erroneous foundation." Fong Loo, 369 U.S., at 143. See also United States v. Ball, 163 U.S. 662 (1896). This Court rejected a similar contention in DiFrancesco and there are even more compelling reasons why it should do so here. 66 L.Ed.2d, at 343.

The majority in DiFrancesco set forth a reasoned and correct analysis of why the imposition of one sentence is not an implied acquittal of any greater sentence for purposes of double jeopardy. Even so, this Court was at least faced with a double jeopardy argument arising from two distinct impositions of sentence. Put another way, the initial sentence from which the appeal was taken in DiFrancesco was at least arguably final. The same can hardly be said of a jury advisory recommendation which a Florida trial judge is by statute empowered to override.

The recommendation of the jury in a capital sentencing proceeding in Florida is more analogous to the circumstances in Swisher, supra. In Swisher, this Court rejected a double jeopardy attack upon a state

procedure whereby a juvenile court judge could accept, modify or reject the recommendations of a master and even take additional evidence under certain circumstances. While this Court did not address the issue of whether jeopardy attached to a juvenile at the proceeding before the master, the court did find that the juvenile procedure under review subjected the juvenile "to a single proceeding which begins with a master's hearing and culminates with an adjudication by the judge." 438 U.S., at 215. Swisher was thus said to differ from the circumstances in Breed v. Jones, 421 U.S. 519 (1975), wherein an adult trial of a juvenile following a juvenile proceeding involving the same conduct was found to constitute double jeopardy. Swisher, 438 U.S., at 217-218. So, too, does the Florida capital sentencing procedure differ from two distinct verdicts at two distinct proceedings. In short, Florida subjects a capital defendant to a single proceeding which begins with a trial on the merits, and if the verdict be guilty as charged, culminates with an adjudication by the judge who may accept or reject the recommendation of the jury.

The third protection recognized by this Court, one against multiple punishments, is likewise not involved in this case. Again, in DiFrancesco, this Court ruled that this protection did not prohibit an increase in punishment, especially where under the statutory scheme the defendant had "no expectation of finality in the original sentence." 66 L.Ed.2d, at 347. So long as the punishment imposed did not exceed that authorized by Congress, such an increase did not violate the guarantee against multiple punishment.

66 L.Ed.2d 347. The dissent took issue with this conclusion,[10] but respondent submits that a stronger case is made in favor of the majority's position where, as here, the capital defendant knows that the jury's recommendation is advisory only and, more importantly, that recommendation does not constitute an imposition of sentence which is "increased" by the judge's decision to override it. Accordingly, the single imposition of sentence by the trial judge cannot conceivably constitute multiple punishment.[11]

It may be true that a capital defendant places as much importance upon his sentence as the determination of his guilt, but the period of anxiety to which this petition must be limited is that period between the recommendation of the jury and the subsequent determination of the judge. In petitioner's case, the judge took over a month to carefully weigh the evidence and recommendation of the jury before deciding to override that recommendation.[12] Moreover, as this Court also stated in DiFrancesco, "[t]he Double Jeopardy Clause does not provide

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[10] The dissent was concerned with the implications of the suggestion that double jeopardy protections could be legislatively circumvented so long as the defendant was aware that his sentence could be increased on appeal. DiFrancesco, 66 L.Ed.2d, at 354. This concern is not attendant to a sentencing scheme however which provides for only one imposition of sentence (by the sentencing judge) which can only be affirmed or reduced on appeal.

[11] Of course, Florida law neither permits nor contemplates the imposition of the sentence of death for the first time on appeal.

[12] The jury rendered its advisory recommendation on December 9, 1978 and the sentence of death was imposed on January 12, 1979.

the defendant with the right to know at any specific time what the exact limit of his punishment will turn out to be." 66 L.Ed.2d, at 346. While this Court was thus stating that a penalty could be increased on appeal, in Florida the capital defendant knows that the Florida Supreme Court can only affirm or reduce his death sentence.

When viewed in the light of DiFrancesco, we find nothing in Mr. Justice Story's hypothetical relevant to this issue since it so obviously involved the double jeopardy considerations attendant to a retrial for a more severe offense following an acquittal for what is essentially a lesser included offense. United States v. Gilbert, Case No. 15,204, 25 Fed.Cas. 1287, 1301 (C.C.D. Mass. 1834). The jury in making its recommendation, and the judge in determining sentence, must find beyond a reasonable doubt the existence of at least one aggravating circumstance which outweighs any mitigating circumstance. This requirement does no more than guide the jury and judge in their separate determinations as required by Furman. Those circumstances, aggravating or mitigating, help define the capital offense for the purpose of aiding the judge in determining the sentence to be imposed but in no way raise the jury's recommendation to the level of a verdict of acquittal. Finally, the sentencing judge makes an independent determination as to the existence of aggravating and mitigating circumstances and whether the sentence of death is appropriate because the statute requires that he do so.[13]

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[13] The statute provides in pertinent part:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances,

Accordingly, this is not a situation in which "prolonged jeopardy," if any, results from an appeal by the state.

E. Florida's Practice of Permitting a Trial Judge to Override a Jury Advisory Recommendation is Constitutional and Fair to all Parties Concerned.

Petitioner continues to base his constitutional arguments on the faulty premise that an advisory recommendation of life is the equivalent of a verdict of acquittal. DiFrancesco teaches that it is not. Petitioner's reliance on a footnote in Gregg, 428 U.S., at 199 n. 50, is misplaced. A reading of the footnote leads to the inescapable conclusion that this Court, in rejecting the appellant's arguments that the Georgia statute allowed for too much discretion, was not prepared to require a capital punishment scheme so rigid that it would not allow the jury to afford mercy if empowered so to do, nor otherwise require a scheme so rigid as to be "totally alien to our notions of criminal justice." Id. This is hardly the same thing, however, as stating that the jury must be allowed to bind the judge in affording mercy where the statutory scheme makes the jury's determination advisory only. Proffitt alone teaches us that.

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shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Petitioner's attack upon the Florida Supreme Court's standard of review of death sentences imposed over the recommendation of the jury has already been addressed in this response. By permitting the sentencing judge to override an unreasonable recommendation of life, Florida is merely adhering to the reasoning expressed by this Court in Beck, supra, that "to insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that have tended to diminish the reliability of the sentencing determination.[14] 447 U.S., at 638. Rather than diminish the reliability of the sentencing determination, Florida has, by allowing the trial judge to determine the sentence to be imposed, sought to "assure that the death penalty will not be imposed in an arbitrary and capricious manner." Proffitt, 428 U.S., at 253.

Turning finally to petitioner's four factor due process analysis, we prefer to respond to the three factor analysis used by this Court and by the author of the article upon which petitioner relies. Note, Gardner v. Florida: The Application of Due Process to Sentencing Procedures, 63 Virg.L.Rev. 1281, 1284 n. 28. Therein the author quotes this Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), as follows:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation

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[14] The procedural rules to which this Court referred were those stricken in Gardner, Lockett, and Woodson, supra.

> of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Under this analysis, clearly the capital defendant has an interest in the sentencing scheme, including the authority of the judge to override the recommendation of the jury. But it must be remembered that such interest includes the knowledge that the judge may impose a sentence of life imprisonment over a jury recommendation of death. In short, it is in the defendant's interest that the sentence be determined on the basis of "reason rather than caprice or emotion." Gardner, 430 U.S., at 358. For this very reason the second factor is satisfied, for the Florida tripartite sentencing scheme minimizes the risk that a capital defendant will be erroneously deprived of his interest in the sentence. Similarly, the state's interest that the death penalty be fairly imposed is likewise assured. The fiscal and administrative factors involved are not so significant when the state is exercising this legitimate state action which "differs dramatically from any other" such action. Gardner, 430 U.S., at 358. Petitioner's concern for the impact of these relatively few cases upon judicial economy is likewise unpersuasive in light of recent changes in the jurisdiction of the Florida Supreme Court which greatly lessened its caseload.[15]

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[15] England, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, supra.

F. The Imposition of the Death Penalty by a Trial Judge by Overriding the Advisory Recommendation of the Jury Neither Conflicts With any Plan of Limited and Representative Government nor Violates the Principle of Judicial Restraint.

Basically, petitioner has in his final argument launched an attack upon the determination by the Florida Legislature that judges rather than juries should render the sentencing decision in capital cases. Of course, it is the prerogative of the states to make that determination. Chaffin v. Stynchcombe, supra. But beyond that, this Court in Gregg, 428 U.S., at 175-176, specifically recognized the importance to be attached to the decisions of the various state legislatures with respect to punishments for crimes under our system of government. "Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state, the moral consensus concerning the death penalty" should compel this Court to defer to the wisdom of the Florida Legislature its decision to provide for advisory recommendations of sentence by juries in capital cases. 428 U.S., at 186, 187.

Certainly respondent agrees with petitioner that the death penalty differs markedly from other legitimate state action. But this does not affect the fact that the manner in which Florida has chosen to carry out that action is constitutional.

Petitioner's authority in his final argument is again irrelevant. It is obvious from his article that Justice Powell was concerned with the double jeopardy implications of state appeals from jury verdicts of acquittal. Powell, Jury Trial of Crimes, 23 Washington and Lee L. Rev. 1 (1966). It is clear from his position in DiFrancesco

that Justice Powell does not agree with petitioner that the imposition of a sentence is an implied acquittal of any greater offense so as to equate sentencing determinations with verdicts of guilt or acquittal.

Similarly, the quoted comments of Justice Rhenquist in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 348 (1979), have no bearing on the issues raised in the petition because petitioner was not deprived of his right to a jury, a right the denial of which, as seen by Justice Rhenquist, served as the impetus for his remarks. Nor does respondent find the quoted comments of the United States Solicitor General in his amicus brief in Gregg of any import. Clearly those comments, made in favor of the Georgia sentencing scheme which allows for jury sentencing, must be limited to the facts of the case to which they referred.

Finally we find it interesting that petitioner does not find it to be an abuse of judical restraint for this Court to find that the Florida courts abuse their judicial restraint when they follow the capital sentencing procedures enacted by the elected representatives of the citizens of Florida. If applicable to this petition at all, the doctrine of judicial restraint would require this Court to find an absence of any issue warranting review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

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